TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 137.

EDWARD H. PARDEE AND ARABELLA D. HUNTINGTON, EXECUTRIX, AND CHARLES H. TWEED AND ISAAC E. GATES, EXECUTORS, OF COLLIS P. HUNTINGTON, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

A. D. ALDRIDGE, A. F. HARDIE, AND W. G. MOSES, TRUSTEES FOR J. E. DOWNS AND ASSOCIATES.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF THE STATE OF TEXAS.

FILED JULY 27, 1902.

(18,229.)

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1 *Caption.*

THE STATE OF TEXAS, }
County of Dallas. }

At a term of the district court (44th judicial district of Texas) begun and holden within and for the county of Dallas, at Dallas, and ending on the 31st day of July, A. D. 1899, the following case came on for trial before the Honorable J. M. Avery, special judge, to wit:

A. D. ALDRIDGE ET AL. }
vs. } No. 17147.
E. H. PARDEE ET AL. }

Plaintiffs' First Amended Original Petition.

In District Court, Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL. }
vs. } No. 17147.
E. H. PARDEE ET AL. }

To the honorable court aforesaid:

Now come plaintiffs in said cause, and, by leave of court, file this their first amended original petition, in amendment of and substitution for their original petition, filed herein May 21st, 1898. Your petitioners, A. D. Aldridge, A. F. Hardie and W. G. Mowry, plaintiffs, who sue herein as trustees for J. E. Downes and associates, complaining of Edward H. Pardee and Collis P. Huntington, defendants, respectfully represent:

I.

That plaintiffs, A. D. Aldridge and A. F. Hardie reside in Dallas county, Texas, that plaintiff W. G. Mowry resides in Rensselaer county, New York, and that defendant- Edward H. Pardee and Collis P. Huntington reside in the county of New York, State of New York.

II.

2 Plaintiffs as sole trustees of the legal title to the lands and premises hereinafter described, bring this suit for the use and benefit of J. E. Downes and associates, who were creditors of the Texas Trunk Railroad Company, as formerly variously organized, and their privies and assigns who are beneficially interested in said legal title, and being all such creditors who have authorized and contributed to the expense of this suit; and also for the use and benefit of such other general creditors, if any, having enforceable demands against said company, as are now entitled to participate in the benefits of what may be recovered herein, and who shall in like manner contribute to the expense of this suit, and ratify and adopt said trusts. This suit is brought and prosecuted under the direc-

tion of Dickson & Moroney, who, as attorneys for J. E. Downes and associates are authorized to direct said trustees in the recovery, by suit or otherwise, of any of said property that may be held adversely, or to which any person or persons may assert any adverse claim.

III.

Plaintiffs allege that heretofore, to wit, on May 1, 1898, plaintiffs were lawfully seized and possessed of all those certain lots, tracts and parcels of land lying and being situated in the counties of Dallas, Kaufman and Houston, State of Texas, and hereinafter particularly described, holding the same by fee-simple title; that on the day and year last aforesaid defendants entered upon said premises and ejected plaintiffs therefrom, and unlawfully withhold from plaintiffs the possession thereof, to plaintiffs' damage $30,000; that the premises so entered upon and unlawfully withheld by defendants from plaintiffs are described as follows, to wit:

(*a*.) In Dallas county, Texas, 25 acres, more or less; beginning at the N. W. corner of the Lewis Sweet 130 acres; being a
3 part of the S. A. & M. G. R. R. sur. on Prairie creek thence E. with the N. line of said 130 acres 475–2/10 varas a corner; thence S. 356–4/10 vrs.; thence in a N. W. course to a point 237–6/10 vrs. S. of the beginning and in the W. line of said S. A. & M. G. R. R. sur.; thence N. 237–6/10 vrs. to the beginning, containing 25 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by Lewis Sweet and wife, by deed bearing date March 8th, 1880, and recorded in vol. 49, page 207, deed records, Dallas county, Texas.

(*b*.) Part of the John Grigsby league survey, and being a part of lot No. 5, in the division of said league; beginning at the E. corner of Jacob Bopp on the S. W. line of said lot No. 5; thence N. 45 E. 650 ft. to a cor.; thence S. 45 E. 1680 ft. to a cor.; thence S. 45 W. 650 ft. said boundary line; thence N. 45 W. 1680 ft. on said boundary line to the beginning, containing 25 acres more or less. Being the same land deeded to the Texas Trunk Railroad Company by W. E. Hughes and wife, Annie E. Hughes, and C. C. Slaughter and wife, Cassie C. Slaughter by deed bearing date the 13th day of March, 1880, and recorded in vol. 50, p. 163, deed records, Dallas county, Texas.

(*c*.) In Dallas county, Texas, and being a part of 76⅔ acres out of the Robert Kleburg league, said 76⅔ acres being deeded to Thomas L. Bradshaw by Marshall E. Kleburg, and described as follows, to wit: Beginning at the most western cor. of said 76⅔ acres a stake; thence N. 45 E. to and with the N. W. line of said tract to a stake on Mrs. Daugherty's S. cor.; thence S. 45 E. far enough so as to include 5 acres by running S. 45 W. parallel with the first-named line to a stake in the S. E. boundary of said 76⅔ acres; thence N. 45 W. to the place of beginning, containing 5 acres of land. Being the
4 same land deeded to the Texas Trunk Railroad Company by Thomas L. Bradshaw, by deed bearing *the* date the 3rd day of March, 1880, and recorded in vol. 49 p. 195, deed records, Dallas county, Texas.

(*d.*) Situated in Dallas county, Texas, and being part of the Thomas Lagow league, and beginning at a bois d'arc post with a R. R. spike driven in it at the S. E. corner of Mays' land where he joins the S. W. cor. of Galliher's lands; thence in a N. W. direction along the boundary line between said Mays' and said Galliher's land 600 feet to a stake; thence at right angles to said boundary line of said Mays' and Galliher's 919 ft. to stake on the W. boundary of said Mays; and thence at right angles to said last-named line in a S. E. direction along the W. boundary of said Mays' land 600 feet to a stake on boundary line between said Mays' and J. J. Good's land; thence at right angles to said W. line in an E. direction along the boundary line between said Mays and Good to the place of beginning, the same being 11–92/100 acres of land and being exclusive of land heretofore purchased by said railroad company for its right of way; being the same land deeded to the Texas Trunk Railroad Company by S. R. Mays and wife, A. C. Mays, by deed bearing date the 2nd day of February, 1881, and recorded in vol. 48, p. 586, deed records, Dallas county, Texas.

"*Kaufman County Lands.*"

(*e.*) In Kaufman county, Texas, to wit: forty acres of land out of an undivided interest in the S. half of the J. McCarty sur. situated in said Kaufman county, Texas; beginning at a stake S. E. corner of J. W. Moore sur. and the N. E. corner of Silas Endum sur. from which a P. O. 2 ft. in dia. brs. N. 36 E. 143 vrs.; a black-jack 15 in. dia. brs. N. 36 . . . 14 vrs.; thence N. 3801–6/10 vrs. to stake from which a locust 12 in. dia. brs. S. 42 E. 10 vrs. another 10 in. dia. brs. S. 18 E. 9 vrs.; thence E. 950–4/10 vrs. to a stake from which an elm 15 in. dia. brs. S. 2 W. 6 vrs.; thence S. 3810 vrs. to a stake from which a P. O. 12 in. dia. brs. N. 65 W. 112 vrs.; thence W. 950–4/10 vrs. to the place of beginning. Said forty acres *is* more particularly described as follows: Beginning at the S. W. corner of the I. N. Hamilton 120-acre tract in said McCarty survey, a point 1187 vrs. N. of the S. W. corner of said survey, from which a P. O. 18″ dia. bears S. 39½ E. 9.6 vrs. do. bears N. 12 E. 13 vrs.; thence E. with said Hamilton's south line 950–4/10 vrs. to Hamilton's S. E. corner, from which an elm 7″ dia. brs. N. 21 E. 7 vrs. an elm 30 in. dia. brs. S. 45½ west 25.1 vrs.; thence south a sufficient distance so that a line drawn west 950.4 vrs. paralled with said Hamilton's south line, thence north to beginning point, will include forty acres of land, said forty acres fronting 950.4 varas on said Hamilton's south line, and running south for quantity. Being the same land deeded to Texas Trunk railroad by C. R. Nash, by deed bearing date the 9th day of September, 1881, and recorded in vol. 30, p. 193, deed records, Kaufman county, Texas.

(*f.*) A part of the Chas. Askins league and labor, lying and being situated in said Kaufman county about 2 miles S. from the town of Kaufman; beginning 1794 vrs. N. 40 W. from a stake set on the W. bank of Cottonwood creek, from which a hackberry brs. N. 62 W. 4 vrs. and another brs. W. 6 vrs.; thence S. 45 W. 337½

vrs. stake; thence N. 45 W. 786–2/100 stake; thence N. 45 E. 337½ vrs. stake; thence S. 45 E. 786–7/100 to beginning, containing forty-seven acres of land. Being the same land deeded to the Texas Trunk Railroad Company by J. C. Maples by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 195, deed records, Kaufman county, Texas.

(*g.*) A part of the R. H. Love 622-acre survey; beginning
6 at the N. E. corner of said survey; thence S. 750 vrs.; thence W. 383 vrs.; thence S. 56 vrs.; thence W. 90 vrs.; thence N. 806 vrs.; thence E. 473 vrs. to beginning. Being the same land deeded to Texas Trunk Railroad Company by J. K. Love by deed bearing date the 9th day of September, 1881, and recorded in vol. 30, p. 197, deed records of Kaufman county, Texas.

(*h.*) Being a part of the Peter E. Bean 26-labor survey situated in said Kaufman county. Beginning at the S. E. corner of Mrs. Guthrie's 320-acre survey at a stake from which a mesquite 5 in. dia. brs. S. 56 W. 14 vrs. another mesquite *brs.* 5 in. dia. brs. S. 24 E. 23–5/10 vrs.; thence E. 426 vrs. stake; thence N. 300 vrs. stake; thence W. 150 vrs. stake; thence N. 960 vrs. stake in prairie; thence W. crossing branch 276 vrs. stake in prairie; thence S. 1223 vrs. to place of beginning, containing 68 acres. Being the same land deeded to the Texas Trunk Railroad Company by J. D. Echels by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 198, deed records of Kaufman county, Texas.

(*i.*) A part of the Thomas Jefferson ⅓-league sur. in the said county of Kaufman. Beginning at the end corner of 132½ acres of said Thomas Jefferson land deeded by George Barnett and wife to H. P. Nash on the 7th day of April, A. D. 1871, a post in brush from which an elm 5 in. dia. brs. S. 15 W. 5 vrs. elm 4 in. N. 27 W. 4 vrs. dist.; thence S. 45 E. 564 vrs. corner; thence N. 45 E. 499 vrs. corner on N. E. line of said Jefferson survey; thence N. 45 W. 564 vrs. the N. corner of said Jefferson survey; thence S. 45 W. 499 vrs. to the place of beginning, containing 50 acres, more or less. Being the same land deeded to the Texas Trunk Railroad Company by George Barnett by deed bearing date the 7th day of Sep-
7 tember, 1881, and recorded in vol. 30, p. 200, deed records of Kaufman county, Texas.

(*j.*) Forty acres of land of an undivided interest in the S. E. half of the J. McCarty survey situated in said Kaufman county. Beginning at stake S. E. corner of S. W. Moore survey and the N. E. corner of Silas Endum survey from which a P. O. 2 ft. in dia. brs. N. 36 E. 143 vrs.; a black-jack 15 in. dia. brs. N. 36 . . . 14 vrs.; thence N. 3801 vrs. to a stake from which a locust 12 in. dia. brs. S. 42 E. 10 vrs.; another 10 in. dia. brs. S. 18 E. 9 vrs.; thence E. 950–4/10 vrs. to stake from which an elm 15 in. dia. brs. S. 2 W. 6 vrs.; thence S. 3810 vrs. to stake from which a P. O. 12 in. dia. brs. N. 65 W. 112 vrs.; thence W. 950–4/10 vrs. to place of beginning. Being the same land deeded to the Texas Trunk Railroad Company by B. S. Wood, by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 201, deed records, Kaufman county, Texas.

(*k.*) Lots 2 and 3 in block No. 14, as shown and described in Book I.

page 133, on file in the county clerk's office of Kaufman county, to which reference is made. Being the same land deeded to the Texas Trunk Railroad Company by Wm. H. Barnes by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, page 199, deed records, Kaufman county, Texas.

(*l.*) Being an undivided half of 20 acres deeded to Wood & Nash by W. H. Pyle; beginning at the N. corner of 32 acres deeded to George Ezell by said Pyle and being a part of J. B. Cole 26-labor survey in Kaufman county, from which a P. O. 16 in. dia. brs. N. 31 W. 10 vrs. dist. P. O. 12 in. dia. brs. S. 60 E. ½ vara. dist.; thence N. W. 600 vrs. corner from which a P. O. 12 in. dia. brs. N. 82 . . . 17 vrs. dis. an elm 8 in. dia. brs. N. 72 E. 21 vrs. dist.; thence S. 45
W. 189 vrs.; thence S. 45 E. 600 vrs. corner; thence N. 45 E.
8 189 vrs. to the beginning. Being the same land deeded to the Texas Trunk Railroad Company by B. S. Wood by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 202, deed records, Kaufman county, Texas.

(*m.*) A part of the G. W. Brack survey situated in said county of Kaufman near Old Trinidad, it being a part of a tract set apart by the commissioners in the case of James Shaw *vs.* R. B. Shaw, for partition in the district court of said county, Rhoda Carlisle. Beginning at the N. E. corner of said tract; thence W. 1286 vrs. the N. W. corner of said tract; thence S. 336 vrs.; thence E. 475 vrs.; thence S. 183 vrs.; thence E. 811 vrs.; thence N. 519 vrs. to the place of beginning, containing 100 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by A. E. Carlisle, by deed bearing date the 16th day of September, 1881, and recorded in vol. 30, p. 203, deed records Kaufman county, Texas.

(*n.*) Being a part of the John Spikes headright survey for 640 acres, situated in Kaufman county, Texas, on the waters of Cedar creek. Beginning at the N. E. corner of said Spikes survey; thence S. 672 vrs. corner; thence W. 672 vrs. corner; thence N. 672 vrs. corner on N. boundary line of said Spikes survey; thence E. 672 vrs. to the place of beginning, containing 80 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by Henry Erwin and wife, Nannie Erwin, by deed bearing date the 4th day of October, 1881, and recorded in vol. 30, p. 286, deed records, Kaufman county, Texas.

(*o.*) Situated in the county of Kaufman, State of Texas, on the waters of Lacy creek, being a part of the survey originally granted to M. F. Sims, and described as follows, to wit: an undivided in-
terest of 60 acres of land out of a 250-acre tract in said original
9 survey in the name of M. F. Sims, which survey is situated about 18 miles S. E. of the town of Kaufman, in said Kaufman county, on said Lacy creek, a tributary of Cedar creek, and for a more particular description of said land reference is here made to the records of deeds for Kaufman county, containing 60 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by J. S. Woods, by deed bearing date the 22nd day of August, 1881, and recorded in vol. Y, p. 521, deed records, Kaufman county, Texas.

(*p.*) All of blocks Nos. 5, 7, 9, 11, 13, 43, 45, 15, 23, 25, 29, 31, 33, 27, 83, 59, 61, 63, 67, 71, 73 and 79 and fractional blocks Nos. 17, 75, 65, 77, and 69 and half blocks Nos. 39 and 41 and quarter blocks Nos. 51, 53 and 55 and half blocks Nos. A, C, in the town of Kemp in Kaufman county, Texas, being the same land deeded to the Texas Trunk Railroad Company by A. J. Still and wife, M. B. Still, by deed bearing date the 6th day of October, 1883, and recorded in vol. 34, p. 107, deed records, Kaufman county, Texas.

(*q.*) Situated in the town of Kemp, Kaufman county, Texas: Beginning at the N. E. corner of 50 acres of land sold to J. J. Hudman by J. S. Ables, said land being a part of the J. S. Ables survey; thence W. to line running S. 23 E. from S. E. corner of block No. 64 in said town; thence S. 23 E. to the E. line of said fifty acres, thence N. to the place of beginning. Being the same land deeded to the Texas Trunk Railroad Company by S. M. Hudman by deed bearing date the 6th day of October, 1883, and recorded in vol. 33, p. 614, deed records, Kaufman county, Texas.

(*r.*) Situated in the county of Kaufman, State of Texas, and about ½ of a mile E. of the court-house of Kaufman county, being a part of the J. B. Cole and Thos. Beedy surveys or leagues; beginning at the N. corner of A. L. Carter's 320-acre survey a bois d'arc stake on Kemp and Kaufman road; thence N. 8° 30′ W. mag. 1684 feet a stake on prairie 37 feet from the center of H. & T. C. R. R.; thence N. 79 E. mag. 168 feet to the center of the Texas Trunk railroad; thence on and in same direction 50 ft. a stake, being 50 ft. from the center line of the Texas Trunk railroad; thence S. 12 E. mag. parallel with and 50 ft. from the center line of said Texas Trunk railroad 2011 feet to corner on prairie; thence S. 78 W. mag. 50 ft. to center of Texas Trunk railroad; thence N. 53° 30′ W. mag. 439–4/10 ft. to point of beginning, in all 12½ acres of land, more or less, being about 7¾ acres exclusive of the 100 feet of right of way of the Texas Trunk railroad, the same being a part of our homestead and being all that part of our land lying W. of the Texas Trunk railroad not heretofore deeded to the Houston & Texas Central railroad under date of July 29th, 1882, and the W. boundary line being further defined by the E. side or line of Houston street and Henderson street produced. Being the same land deeded to the Texas Trunk Railroad Company by H. T. Nash and wife, L. J. Nash, by deed bearing date the 23rd day of May, 1890, and recorded in vol. 51, p. 167, deed records, Kaufman county, Texas.

(*s.*) Lots 1, 3, 5, 7, 9, and 11, block 1; lots 1, 3, 5, 7, 9, 11, block 2; lots 1, 3, 5, 7, 9, 11, block 3; lots 1, 3, 5, 7, 9, 11, block 4; lots 3, 7, 9, block 10; lots 5, 7, 9, 11, block 11; and lots 5, 7, 9, 11, in block 13; in the town of Crandall, county of Kaufman, Texas. Being the same land deeded to Wm. G. Mowry, gen. m'g'r of the Texas Trunk Railroad Company by C. F. Crandall and wife, by deed bearing date the 14th day of June, 1886, and recorded in vol. 39, p. 567, deed records, Kaufman county, Texas.

(*t.*) Being a part of the headright of Leonard Williams; Beginning at the E. corner of a survey of 320-acre survey deeded by the executors of the estate of John C. Kennedy

deeded to Catherine H. Chester, from which a hickory 13 in. dia. brs. S. 32 E. 4 vrs.; a P. O. 14 in. dia. brs. N. 89 W. 15 vrs.; thence N. 67 W. 1250 to the N. W. corner of the same from—(8) which a hickory 14 in. dia. N. 82 W. 19 vrs. P. O. 13 in. dia. N. 47 E. 14 vrs.; thence N. 25 E. 921 vrs. to corner in the S. W. boundary of the homestead; from which a red haw 3 in. dia. N. 54 W. 8–1/10 vrs.; a black haw N. 62 E. 84–1/10 vrs.; thence S. 12 E. to the S. corner of the homestead of Mrs. M. S. Kennedy, from which an elm 5 in. N. 51 E. 1–6/10 vrs.; and red oak S. 71 W. 181 vrs.; thence N. 51 E. to stake from which a hickory 6 in. S. 85 E. 15 vrs.; thence S. 67 E. 962 vrs. to the S. W. corner of the P. E. Bean ¼ league in S. E. boundary Leonard Williams league; thence S. 23 W. 1007 vrs. with said line to the beginning. Situated in the county of Houston, and said State of Texas, containing 215 acres. Being the same land deeded to the Texas Trunk Railroad Company by J. C. Maples by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 194, deed records, Kaufman county, Texas.

Wherefore, plaintiffs pray that the defendants be cited to appear and answer this petition, and that on hearing plaintiffs have judgment for the title and restitution of said premises, and for their damages, costs of suit, and for all such other relief, both general and special, as they may in law or equity be entitled to.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Filed 3rd day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

12 *Defendants' First Amended Original Answer.*

Filed July 3rd, 1899.

In Dallas County District Court, Forty-fourth Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Reserving all exceptions to the jurisdiction of this court and protesting against the trial of this cause in this court because the said cause has been legally removed into the circuit court of the United States, the defendants in the above-entitled cause come now by leave of court and file this, their first amended original answer, in lieu of their original answer herein filed on the 20th day of June, 1898, and demur to plaintiffs' first amended original petition herein and say that said petition is insufficient in law to require defendants to answer or to entitle plaintiffs to any relief. And of this defendants pray judgment of the court.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

And for further answer in this behalf the defendants in said cause demur to plaintiffs' first amended original petition herein and say that the same is insufficient in law because it appears therefrom that plaintiffs are not actually interested in the subject-matter of this suit, but are assuming to represent and sue in behalf of others whose names and interest are not disclosed. And of this defendants pray judgment of the court.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

And for plea in this behalf the said defendants come and defend the force and injury alleged by plaintiffs and say that they
13 are not, and that neither of them is guilty of the said supposed wrongs, injuries and trespasses alleged by plaintiffs and laid to their charge, or any or either of them, in manner and form as the said plaintiffs have thereof complained against them. And of this they put themselves upon the country.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

And for further plea in this behalf the said defendants say that the said plaintiffs ought not to have and maintain their aforesaid action thereof against them because they say that they, and those whose estate they have, claiming the same under deeds duly registered, have had peaceable and adverse possession of the lands and tenements claimed in said plaintiffs' petition, using and enjoying the same and paying all taxes due thereon for a period of more than five years next before the commencement of this suit. And this they are ready to verify.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

And for further plea in this behalf said defendants say that the said plaintiffs ought not to have and maintain their aforesaid action thereof against them because they say that they, claiming to have good and perfect right and title to the four tracts of land, each bounded and described as follows·

(*a.*) In Dallas county, Texas, 25 acres, more or less; beginning at the N. W. corner of our 130 acres; being a part of the S. A. & M. G. R. R. survey on Prairie creek; thence E. with the N. line of said 130 acres 475–2/10 varas a corner; thence S. 356–4/10 varas; thence in an N. W. course to a point 237–6/10 vrs. S. of the beginning and in the W. line of said S. A. & M. G. R. R. survey; thence N. 237–6/10 vrs. to the beginning, containing 25 acres of land.
14 Being the same land deeded to the Texas Trunk Railroad Company by Lewis Sweet & wife, by deed bearing date *the* March 8th, 1880, and recorded in vol. 49, page 207, deed records, Dallas county, Texas.

(*b.*) Part of the John Grigsby league survey, and being a part of lot No. 5 in the division of said league; beginning at the E.

corner of Jacob Bopp on the S. W. line of said lot No. 5; thence N. 45 E. 650 feet to a corner; thence S. 45 E. 1680 ft. to a corner; thence S. 45 W. 650 ft. said boundary line; thence N. 45 W. 1680 ft. on said boundary line to the beginning, containing 25 acres more or less. Being the same land deeded to the Texas Trunk Railroad Company by W. E. Hughes & wife, Annie E. Hughes, and C. C. Slaughter and wife, Cassie C. Slaughter, by deed bearing date the 13th day of March, 1880, and recorded in vol. 50, p. 163, deed records, Dallas county, Texas.

(*c.*) In Dallas county, Texas, and being a part of 76⅓ acres out of the Robert Kleburg league, said 76⅓ acres being deeded to me by Marshall E. Kleburg, and described as follows, to wit: Beginning at the most western corner of said 76⅓ acres a stake; thence N. 45 E. to and with the N. W. line of said tract to a stake on Mrs. Daugherty's S. corner; thence S. 45 E. far enough so as to include 5 acres by running S. 45 W. parallel with the first-named line to a stake in the S. E. boundary of said 76⅓ acres; thence N. 45 W. to the place of beginning, containing 5 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by Thomas L. Bradshaw, by deed bearing date the 3rd day of March, 1880, and recorded in vol. 49, p. 195, deed records, Dallas county, Texas.

(*d.*) Situated in Dallas county, Texas, and being a part of the Thomas Lagow league, and beginning at a bois d'arc post
15 with a R. R. spike driven in it at the S. E. corner of said Mays' land where he joins the S. W. corner of Galliher's lands; thence in a N. W. direction along the boundary line between said Mays' and said Galliher's land 600 feet to stake; thence at right angles to said boundary line of *of* said Mays' and Galliher's 919 ft. to a stake on the W. boundary of said Mays; and thence at right angles to said last-named line in a S. E. direction along the W. boundary of said Mays' land 600 ft. to a stake on boundary line between said Mays' and J. J. Good's land; thence at right angles to said W. line in an E. direction along the boundary line between said Mays and Good to the place of beginning, the same being 11–92/100 acres of land and being exclusive of land heretofore purchased by said railroad company for its right of way; being the same land deeded to the Texas Trunk Railroad Company by S. R. Mays and wife, A. C. Mays, by deed bearing date the 2nd day of February, 1881, and recorded in vol. 48, p. 586, deed records, Dallas county, Texas, have had and held peaceable and adverse possession of the same, being part of the lands and tenements claimed in said plaintiffs' petition, using and enjoying the same for a period of more than ten years next before the commencement of this suit. And this they are ready to verify.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Wherefore, defendants pray judgment that plaintiffs take nothing by their action herein and that defendants go hence without day and recover of and from the plaintiffs all costs by them in this be-

half incurred, and also for such other and further relief as they may be entitled to in law or equity.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

16 Filed 3rd day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas.
CALHOUN KNOX, *Deputy.*

Petition for Removal to U. S. Court.

Filed June 6th, 1898.

In the Forty-fourth Judicial District Court in and for Dallas County, Texas.

A. D. ALDRIDGE, A. F. HARDIE, and W. G. MOWRY, Trustees for J. E. Downs and Associates, Plaintiffs,
vs.
EDWARD H. PARDEE and COLLIS P. HUNTINGTON, Defendants.
} No. 17147.

To the honorable judge of said court:

Your petitioners, Edward H. Pardee and Collis P. Huntington, each represents that he was at the time of the commencement of this, the above numbered and entitled suit, has ever since been, and still is a citizen of the State of New York and a non-resident of the State of Texas; and they are the only defendants in this suit. And that plaintiffs A. D. Aldridge, A. F. Hardie and J. E. Downs and associates were at the time of the commencement of this suit, have ever since been and still are each and all residents and citizens of the State of Texas. Petitioners have no knowledge or information of the residence or citizenship of plaintiff W. G. Mowry further than as disclosed in and by plaintiffs' original petition herein filed, wherein it is stated that he "resides in —— county, New York," but petitioners each aver that said W. G. Mowry at the time of the institution of this suit had no interest, has not at any time since had any interest and has not now any interest in any of the property in plaintiffs' petition mentioned, or in the recovery herein sought by plaintiffs, or in the subject-matter of this suit, and is, at most, only a formal party without real or substantial interest in the subject-matter of this suit and without any title to the property sought to be recovered in this suit, or to any part thereof. Petitioners each further avers that said W. G. Mowry was at the time of the commencement of this suit, has ever since been and still is without any interest in the subject-matter of this suit and was fraudulently joined and named as a plaintiff in this suit with the intent to, and only for the purpose of depriving these petitioners, who were and are, as aforesaid, citizens of the State of New York and non-residents of the State of Texas,

17

of their right under the Constitution and laws of the United States to remove this cause into the circuit court of the United States for the northern district of Texas and to prevent the removal of this cause into the said circuit court in fraud of the jurisdiction of said circuit court and of the aforesaid right of these petitioners, and he is a sham party plaintiff herein.

Petitioners each further represents that this, the above numbered and entitled cause is a suit of a civil nature at law, and that the controversy therein is wholly between citizens of different States, to wit, between A. D. Aldridge, A. F. Hardie and J. E. Downes and associates, plaintiffs, citizens of the State of New York, and your petitioners, as defendants, citizens of the State of New York and non-residents of the State of Texas; and that the matter in dispute in said suit exceeds, exclusive of interest and costs, the sum of two thousand dollars, and is, to wit, more than thirty thousand dollars, as will appear by plaintiffs' petition herein.

Petitioners each aver- that they are not required by the laws of the State of Texas or by the rules governing the courts of said
18 State to answer or plead to the declaration complaint or petition of the plaintiffs in this suit as yet, but they enter their appearance at this time for the purpose of removing the said suit into the circuit court of the United States for the northern district of Texas.

And your petitioners offer herewith a bond with good and sufficient surety for their entering in the circuit court of the United States for the northern district of Texas on the first day of its next session a copy of the record in this suit and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, petitioners each pray- this honorable court to proceed no further in this suit except to make the order of removal required by law, and to accept the said surety and bond and to cause the record in this suit to be removed into the said circuit court of the United States in and for the northern district of Texas. And your petitioners will ever pray.

EDWARD H. PARDEE,
COLLIS P. HUNTINGTON,
By BAKER, BOTTS, BAKER & LOVETT,
Their Attorneys.

R. S. LOVETT, *Of Counsel.*

THE STATE OF TEXAS, }
County of Harris. }

Before me, the undersigned authority, on this day personally appeared R. S. Lovett, who, after being by me duly sworn, on oath says that he is an attorney and of counsel for Edward H. Pardee and Collis P. Huntington, the above-named petitioners; that both said Pardee and said Huntington are citizens of the State of New York and non-residents of the State of Texas, and are absent from the State of Texas; that he has read the foregoing petition and

the same is true of his own knowledge, excepting the allega-
19 tions thereof respecting the residence and citizenship of "J. E. Downs and associates," respecting the lack of interest of W. G. Mowry in the subject-matter of this suit and the intent with and purposes for which said Mowry was joined as a plaintiff in this suit, and as to those allegations he believes them to be true.

R. S. LOVETT.

Sworn to and subscribed before me this 4th day of June, 1898.
[SEAL.] JNO. H. McCLUNG,
Notary Public.

Filed 6th of June, A. D. 1898. Harris county, Texas.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Bond for Removal.

Filed June 6th, 1898.

In the Forty-fourth Judicial District Court in and for Dallas County, Texas.

A. D. ALDRIDGE ET AL.
vs.
EDWARD H. PARDEE ET AL. } No. 17147.

Know all men by these presents, that we, Edward H. Pardee and Collis P. Huntington, as principals, Wm. D. Cleveland and C. Lombardi, as sureties, are holden and stand firmly bound unto A. D. Aldridge, A. F. Hardie, W. G. Mowry and J. E. Downs and associates in the penal sum of one thousand dollars, for the payment whereof well and truly to be made unto the said A. D. Aldridge, A. F. Hardie and W. G. Mowry and J. E. Downs and associates, their heirs, representatives and assigns, we bind ourselves, our heirs, representatives and assigns, jointly and severally, firmly by these presents, upon the condition, nevertheless, that, whereas, the said Edward H. Pardee and Collis P. Huntington have peti-
20 tioned the forty-fourth judicial district court in and for Dallas county, Texas, for the removal of a certain cause therein pending, wherein said A. D. Aldridge, A. F. Hardie and W. G. Mowry suing as trustees for J. E. Downs and associates are plaintiffs and the said Edward H. Pardee and Collis P. Huntington are defendants, into the circuit court of the United States for the northern district of Texas.

Now, if the said Edward H. Pardee and Collis P. Huntington shall enter — the said circuit court of the United States for the northern district of Texas on the first day of its next session a copy of the record in said suit and shall pay all costs that may be awarded by said circuit court if said court shall hold that said suit was

wrongfully or improperly removed thereto, then this obligation shall be void; otherwise it shall remain in full force and virtue.

Witness our hands this 4th day of June, A. D. 1898.

COLLIS P. HUNTINGTON,
EDWARD H. PARDEE,
By BAKER, BOTTS, BAKER & LOVETT, *Their Attorneys.*
WM. D. CLEVELAND.
C. LOMBARDI.

STATE OF TEXAS, }
County of Harris. }

I, J. W. Williams, clerk of the district court in and for said county of Harris, do hereby certify that Wm. D. Cleveland and C. Lombardi, whose names appear signed to the annexed bond, are in my opinion good and ample security for the amount therein specified, and that if said bond was offered to me for approval, the same would be accepted and approved.

To certify which, I have hereunto set my hand and official
21 seal, this 4th day of June 1898.

J. B. WILLIAMS,
Clerk Dist. Court, Harris Co., Texas,
[L. S.] By E. H. DUMBLE, *Deputy.*

Filed June 6, 1898.

H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KONX, *Deputy.*

Plaintiffs' Answer to Defendants' Petition for Removal to U. S. Circuit Court.

Filed June 7th, 1898.

In District Court of Dallas County, Texas, Forty-fourth Judicial District.

A. D. ALDRIDGE ET AL.
vs.
EDWARD H. PARDEE ET AL. } No. 17147.

Now come plaintiffs in said cause and except to the petition for removal of said cause to the United States circuit court, filed herein on the 6th day of June, 1898, by defendants, and say that the same is insufficient in law of which they pray judgment of the court.

2. And for further answer, if need be, to said petition for removal plaintiffs come and deny all and singular the allegations therein contained, except in so far as said allegations are admitted or alleged in plaintiffs' original petition herein, and in this reply to said petition for removal.

3. And for special answer, if need be, to said petition for removal, defendants allege that plaintiffs A. D. Aldridge, A. F. Hardie and

W. G. Mowry are, and at the institution of this suit were jointly seized, as joint trustees, of the title to the property described in plaintiffs' petition, upon which plaintiffs rely for recovery in this suit. That the said W. G. Mowry is, and at the time of the institution of this suit was, and ever since has been a resident citizen of the city of Troy in the State of New York, and that at the insti-
22 tution of this suit nor at any time since has he been a resident or a citizen of the State of Texas. That the said Mowry is a real and substantial and necessary party to this suit.

1st. As being one of the three trustees above named in whom the legal title to the property described in plaintiffs' petition, and upon which plaintiffs rely for a recovery, is now vested and was vested at the time of the institution of this suit.

2nd. Because the said W. G. Mowry is, and at the institution of this suit was, beneficially interested in this suit and in the title asserted by plaintiffs herein, and upon which plaintiffs rely for a recovery herein; and that the beneficial interest of said Mowry in said title and in said suit is more than six times as great as the interest of the other two trustees, Aldridge and Hardie, combined.

4. Plaintiffs further allege that the said Mowry was not joined as a plaintiff herein for the purpose of depriving defendants of the right to remove said cause to the United States circuit court, but for the reason, as then stated, that he was a necessary party plaintiff herein, being one of the trustees of the legal title, and largely and substantially interested as a beneficiary in said title. All of which defendants are ready to verify.

DICKSON & MORONEY,
Att'ys for Plaintiffs.

THE STATE OF TEXAS, }
County of Dallas. }

Before me, the undersigned authority, on this day personally appeared W. J. Moroney, personally known to me, who, being duly sworn, deposes and says that he is attorney for plaintiffs in the above entitled and numbered cause. That plaintiff W. G. Mowry is now absent from the State of Texas. That affiant has per-
23 sonal knowledge of the matters of fact set forth in the foregoing instrument, and that said matters of fact so set forth are within the knowledge of affiant true.

W. J. MORONEY.

Sworn to and subscribed before me this, the 6th day of June, A. D. 1898.

H. W. JONES,
Dist. Clerk, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Filed June 7, 1898.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Order Overruling Petition for Removal to U. S. Circuit Court.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

JUNE 20, 1898.

On this day came on for hearing in the above-entitled cause the petition of defendants Edward H. Pardee and Collis P. Huntington, and accompanying bond, filed herein on the 6th day of June, 1898, to remove said cause to the United States circuit court for the northern district of Texas, which petition and bond *was* presented to this court and action thereon requested by defendants on the 6th day of June, 1898, but action thereon having been postponed until this day without prejudice to the rights of defendants, by agreement of plaintiffs; and the court having now heard argument of counsel for both plaintiffs and defendants, because it is the opinion of the court that said petition for removal fails to show a sufficient ground for removing said cause to the United States circuit court, it is now ordered, adjudged and decreed by the court that the said petition be and the same is hereby refused, to which ruling of the court said defendants Edward H. Pardee and Collis P. Huntington in open court except.

24 In connection with the above order the court finds as a fact that the sureties on said bond, Wm. D. Cleveland and C. Lombardi, are good and sufficient.

Certified Copy of Order of U. S. Circuit Court Remanding Cause to State Court.

Filed March 23rd, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 2142.

On February 13, 1899, this cause came on to be heard on the motion of plaintiffs A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes and associates, to remand said cause to the district court of Dallas county, Texas, 44th judicial district, where said suit was filed on May 21, 1898, by said plaintiffs against E. H. Pardee and C. P. Huntington, defendants, the number of said cause in said State court being 17147, and thereupon said motion was submitted to this court on the record, evidence and argument of counsel for the respective parties, and said motion was thereupon taken under advisement by the court.

And the court having duly considered said record, evidence and argument of counsel, and now being of the opinion that said motion to remand ought to be granted, it is now, on this, the 27th day of February, 1899, ordered, adjudged and decreed by the court that said motion be and the same is hereby granted, and said cause is

hereby remanded to the district court of Dallas county, Texas, 44th judicial district, and the clerk of this court is directed to issue a certified copy of this order to be filed in said State court, advising said State court of the action of this court in the premises.

THE UNITED STATES OF AMERICA, }
Northern District of Texas. }

25 I, J. H. Finks, clerk of the circuit court of the United States for the northern district of Texas, do hereby certify that the above and foregoing is a full, true and correct copy of the order of the court on the motion of plaintiffs to remand the cause in case No. 2142, A. D. Aldridge *et al. vs.* E. H. Pardee *et al.*, as the same appears of record in my office at Dallas, Texas.

Witness my hand and seal of said court at Dallas, Texas, this March 7th, 1899.

J. H. FINKS, *Clerk*,
[SEAL.] By CHAS. H. LEDNUM, *Deputy*.

Filed 23rd day of March A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By W. R. BOWEN, *Deputy*.

Order Entered Showing that Hon. J. M. Avery Qualified as Special Judge.

A. D. ALDRIDGE ET AL. }
vs. } 17147. Entered as of June 14th, 1899.
E. H. PARDEE ET AL. }

WEDNESDAY, *July 12th*, 1899.

On this the 14th day of June, 1899, it appearing to the court that the regular judge of this court is disqualified to try the above entitled and numbered cause by reason of his relationship within the prohibited degrees with one of the plaintiffs, the said judge, Richard Morgan, Esq., enters his disqualification herein.

Again, on June 19, 1899, there is filed a letter herein from the Hon. Joseph D. Sayers, governor of Texas, addressed to the Hon. Richard Morgan, judge of the 44th judicial district, Dallas, Texas, acknowledging receipt of certificate of disqualification by said Hon. Richard Morgan, to try said cause, and stating that the Hon. Irby Dunklin, judge of the 48th judicial district, has been designated to exchange districts with said Hon. Richard Morgan, and notified to that effect. And again on July 3, 1899, there
26 is filed herein a certificate from the Hon. Irby Dunklin, judge of the 48th judicial district of Texas, that on account of his official duties of said 48th judicial district, it will be impossible for him to exchange districts and to act as judge in the trial of said cause. And it thus appearing that the regular judge of this court is disqualified to try the cause, and that it is impossible for said judge to exchange districts with the Hon. Irby Dunklin judge

of the 48th judicial district; thereupon, on this the 3rd day of July 1899, came the parties and file herein the following agreement in writing, to wit:

In District Court of Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Whereas, the Hon. Richard Morgan, judge of the 44th judicial district of Texas, is disqualified to try the above entitled and numbered cause, and has heretofore certified such disqualification to the governor of Texas, who thereupon designated the Hon. Irby Dunklin, judge of the 48th judicial district of Texas, to exchange districts with the said Hon. Richard Morgan, and try such case, and said governor of Texas thereupon notified both said judges of such order, and

Whereas, it is impossible for said judges to exchange districts, and the said Hon. Irby Dunklin has so certified in writing, whereby it has become necessary for the parties to said cause to select and agree upon an attorney of the court as special judge for the trial of said cause,—

Therefore it is hereby agreed by and between the parties to said cause, through their respective counsel, that John M. Avery, Esq., a duly licensed and practicing attorney of said 44th judicial district court, be and he is hereby selected and agreed upon as special
27 judge to try said cause.

DICKSON & MORONEY,
Attorneys for Plaintiffs.
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

And thereupon, on said 3rd day of July, 1899, the oath prescribed by law was duly administered to said Hon. John M. Avery, special judge. And thereupon on said 3rd day of July 1899, it is ordered by the court, Hon. John M. Avery, special judge, presiding, that both plaintiffs and defendants have leave to amend their pleadings.

JOHN M. AVERY,
Special Judge, Presiding.

Charge of Court and Verdict.

Filed July 8th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

GENTLEMEN OF THE JURY: As to all the land sued for, except the 25 acres bought from Hughes and Slaughter, and described as tract No. *b* in plaintiffs' petition and the 11-92/100-acre tract bought

from Mays and wife, and described as tract No. *d* in plaintiffs' petition, you will find for the plaintiff, leaving out the right of way over all said land, and as to these tracts the form of your verdict will be as follows:

(1.) "We, the jury, find for the plaintiffs all the land sued for save and except the right of way of the Texas Trunk railroad through the towns of Kaufman and Crandall as shown on the maps of said towns recorded in vol. 50, page 163 and vol. 33, page 606, of the deed records of Kaufman county, Texas, and save and except a right of way one hundred feet in width on each side of the
28 center of the main track of the Texas Trunk railroad where it may cross any of said land, and also save and except the 25-acre tract bought from Hughes and Slaughter and described as tract No. *b* in plaintiffs' petition and the 11–92/100-acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition.

K. J. KIVLEN, *Foreman.*"

As to said 25-acre tract bought from Hughes and Slaughter and the 11–92/100-acre tract bought from Mays and wife, the case will be submitted to you on special issues. As to some of the facts connected with these two tracts the evidence is not conflicting, and in regard to the following facts you will return the following two answers:

(2.) "We, the jury, find that the 25-acre tract described in plaintiffs' petition as tract No. *b*, was bought by the Texas Trunk railroad from Hughes and Slaughter, the deed is dated March 8, 1880, but was not delivered until several months thereafter, but during the year 1880, at the time it was purchased, it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the railroad and whatever switches and side tracks should be necessary in the operation of the road, and if these did not occupy all of the land then to sell lots on the eastern side of the land to its employees so that they might be near their work; no such sales have ever been made, nor has any part of the land been subdivided into lots; the railroad built its main track across the land near its western boundary, and also built a side track on it and a Y near the center of it extending eastwardly across the land to beyond the center of the land and also a small house used as a ticket office and car shed; it used in the operation of its road up to 1892 the main and
29 side track and houses; this was the only land the road owned in Dallas where it terminated; both as originally contemplated and as actually constructed, if the road had been properly constructed and operated it would have needed as much as 25 acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of such construction and operation.

K. J. KIVLEN, *Foreman.*"

(3.) "We, the jury, find that the 11–92/100-acre tract described in plaintiffs' petition as tract No. *d* was bought by the Texas Trunk railroad from Mays and wife on February 2nd, 1881; it had on it sand; at the time of its purchase it was the purpose and intention of the railroad company, and its officers, to use the sand in the construction and ballasting of the road-bed, and also to place on it such switches and side tracks as might be necessary in the operation of the road; the main track of the road was built across it near its eastern boundary, and also a spur track running out from the main track (but near to it) across the land so as to reach the sand; sand has since been taken from the land and used in the construction and repairing and ballasting the road; the road has thus occupied about two acres of the tract; if the road was properly constructed and operated it would be necessary to use sand in order to do so properly and successfully.

K. J. KIVLEN, *Foreman.*"

You will find from the evidence and answer the following special issues numbered 3*a* & 3*b*:

3*a*. Was the said 11–92/100-acre tract bought by the Texas Trunk Railroad Company for use, either immediate or prospective, in the construction, repair or improvement of its railroad?

Answer. No.

K. J. KIVLEN, *Foreman.*

30 3*b*. Was the said 11–92/100-acre tract mentioned in the last preceding question reasonably necessary in 1880 or in 1888 for then present or the prospective use of the Texas Trunk Railroad Company in the construction, repair or improvement of its railroad then built or authorized by its charter to be built and operated?

Answer. No.

K. J. KIVLEN, *Foreman.*
J. M. AVERY,
Special Judge.

Filed 8th day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs request the court to submit to the jury the following special issues:

Fourth Special Issue.

Was all or any part of that portion of the Hughes and Slaughter 25-acre tract sued for by plaintiffs originally acquired by the

Texas Trunk Railroad Company for the purpose of subdividing the same into lots and selling the same to employés of the company?

Answer. Yes.

K. J. KIVLEN, *Foreman.*

Fifth Special Issue.

If you answer the fourth special issue in the affirmative, and if you further find that only a part of said tract was acquired for the purposes stated, that is, of subdivision into lots and sale thereof, then state what part of said tract was so intended, describing the same in your answer.

Answer. All but 100 feet off the west boundary line of said
31 tract of land.

K. J. KIVLEN, *Foreman.*

Sixth Special Issue.

Was any part of that portion of the 25 acres sued for by plaintiffs actually used by the railroad company, in connection with the operation of the railroad, at the date of the International Trust Company mortgage, March 22, 1880; if so, how was it used, and what part of said land was so used, describing it particularly.

Answer. No.

K. J. KIVLEN, *Foreman.*

Seventh Special Issue.

It appearing by the evidence that when said International Trust Company mortgage was foreclosed on January 31, 1883, a portion of the 25-acre tract was used by the railroad company for a Y to switch cars, turn the locomotive, etc., you will answer:

First. Describe the land that was then so used, including so much of said land as was reasonably necessary in connection with said cause.

Answer. No evidence that any Y existed at that date.

K. J. KIVLEN, *Foreman.*

Second. Was such use of a permanent character, and so intended at the time; or was such use then intended as only of a temporary character?

Answer. Any part of said 25 acres used by said railroad company at that date except 100 feet on west boundary line was only of a temporary character.

K. J. KIVLEN, *Foreman.*

Eighth Special Issue.

Was any part or all that portion of the land that was formerly used as a Y so used when the Central Trust Company mortgage was executed, August 30, 1888? If so, state whether it was all
32 the land formerly so used, or only a part, and if only a part, describe such part of the land particularly.

Answer. No evidence that any part of said Y was used by the railroad company on August 30, 1888.

K. J. KIVLEN, *Foreman.*

Ninth Special Issue.

Had that part of the 25-acre tract sued for and formerly occupied as a Y been permanently abandoned for such use when the Central Trust Company mortgage was foreclosed on February 26, 1895?

Answer. Yes.

K. J. KIVLEN, *Foreman.*

Tenth Special Issue.

Did the railroad company, under any of its organizations, ever actually use for railroad purposes, or in connection with the operation of the railroad, any part of that portion of the 25-acre tract sued for by plaintiffs, other than so much of said land as was occupied by said Y?

Answer. No.

K. J. KIVLEN, *Foreman.*

Eleventh Special Issue.

Considering the reasonable intentions and actual or probable present and future needs of the railroad company when the International Trust Company mortgage was executed on March 22, 1880, was all or any part of that portion of the 25 acres sued for by plaintiffs then reasonably necessary for the construction, equipment or operation of the railroad?

Answer. None.

K. J. KIVLEN, *Foreman.*

If you answer that all was not, but that a part was necessary, then state what part was so necessary, describing it in your answer.

Twelfth Special Issue.

33 Considering the reasonable intentions and actual or probable present and future needs of the railroad company when the International Trust Company mortgage was foreclosed on January 31, 1883, was all or any part of that portion of the 25 acres sued for by plaintiffs then reasonably necessary for the construction, equipment or operation of the railroad? If you answer that all was not but that a part was so necessary, then state what part was so necessary.

Answer. None.

K. J. KIVLEN, *Foreman.*

Thirteenth Special Issue.

Considering the reasonable intentions and actual or probable, present and future needs of the railroad company when the Central

Trust Company mortgage was executed on August 30, 1888, was all or any part of that portion of the 25 acres sued for by plaintiff- then reasonably necessary for the construction, operation or management of the railroad. If you answer that all was not, but that a part was so necessary, then state what part was so necessary.

Answer. None.

K. J. KIVLEN, *Foreman.*

Fourteenth Special Issue.

Was all or any part of that portion of the Mays 11–92/100 acres tract sued for by plaintiffs originally acquired by the railroad company for the purpose of subdividing the same into lots and selling the same to employés of the company ?

Answer. Yes, all.

K. J. KIVLEN, *Foreman.*

Fifteenth Special Issue.

If you answer the fourteenth special issue in the affirmative, and if you further find that only a part of said tract was acquired for the purposes stated, that is, of subdividing into lots and sale thereof, then state what part of said tract was so intended, describing
34 the same in your answer.

Answer. —.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Att'ys for Plaintiffs.

Given:
J. M. AVERY,
Special Judge.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs request the court to submit to the jury the following special issues:

DICKSON & MORONEY,
Att'ys for Plaintiffs.

Sixteenth Special Issue.

Was the railroad company actually using the Y on the 25-acre tract when the Central Trust Company mortgage was executed on August 30, 1888?

Answer. No.

K. J. KIVLEN, *Foreman.*

Seventeenth Special Issue.

If you answer the above special issue (sixteenth) in the negative, then had the use of said Y by the railroad company been perma-

nently abandoned by the railroad company when said Central Trust Company mortgage was executed on August 30, 1888?

Answer. No evidence of the Y being there at that date.

K. J. KIVLEN, *Foreman.*
ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Att'ys for Plaintiffs.

Given:
J. M. AVERY,
Special Judge.

Eighteenth Special Issue.

The court submits the following additional issue:

What was the nearest point of the Y on the 25-acre tract (at any time) from the eastern boundary of said tract?

J. M. AVERY,
Special Judge.

35 Answer. 275 feet.

K. J. KIVLEN, *Foreman.*

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs request the court to give to the jury the following special issue:

Nineteenth Special Issue.

When the Hughes and Slaughter tract was acquired by the railroad company, was it then the intention of the railroad company to use the Gaston tract (testified to as the "flat-iron" tract) for its terminal, and to place thereon its depot or depots and shops, or any of said structures?

Answer. Yes.

K. J. KIVLEN, *Foreman,*
ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Att'ys for Plaintiffs.

Given:
J. M. AVERY,
Special Judge.

Filed 8th day of July, A. D. 1899.

H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 1 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 1 requested by plaintiffs.

The jury are instructed to find for plaintiffs in this case.

Plaintiffs request the court to give to the jury the above special charge.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Att'ys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

36 Filed 7th day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 2 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 2 requested by plaintiffs.

The jury are instructed to find for plaintiffs that portion sued for of the 25-acre tract deeded to the railroad company by Hughes and Slaughter.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Att'ys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 3 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 3 requested by plaintiffs.

The jury are instructed to find for plaintiffs that portion of the 11-92/100 — tract deeded to the railroad company by Mays and sued for by plaintiffs.

Plaintiffs request the court to give to the jury the above special charge.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Att'ys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

37 *Special Charge No. 4 Requested by Plaintiffs Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 4 requested by plaintiffs.

The jury are instructed that on the issues as to the use by the railroad company for railroad purposes of any of the property sued for, or the necessity or intention to so use it, the burden of proof is on the defendants in this case to show such use, necessity or intention.

On the issues as to whether or not any of the property, if any, once used for railroad purposes, was afterwards permanently abandoned for such use or uses, the burden of proof is on the plaintiffs in this case to show such permanent abandonment. The party upon whom rests the burden of proof in any issue must make out his case on such issue by a preponderance of the evidence. If he does so, you will find such issue in his favor; otherwise you will find against him.

Plaintiffs request the court to give to the jury the above special charge.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 5 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 5 requested by plaintiffs.

The jury are instructed as follows:

38 Under the statutes of Texas, when the Central Trust Company mortgage was executed on August 30, 1888, the Texas Trunk Railroad Company had forfeited the right, under its charter, to extend its road beyond its terminus at or near Cedar station in Kaufman county.

Plaintiffs request the court to give to the jury the above special charge.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July, 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 6 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 6 requested by plaintiffs.

The jury are instructed as follows:

You are not authorized to find that any of the property involved in this suit, and not actually used for railroad purposes, or not fairly necessary to hold in connection with what is or was used for railroad purposes, was intended by the railroad company for railroad purposes.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 7 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

39 Special charge No. 7 requested by plaintiffs.

You are instructed as follows:

Under the statutes of this State, a railroad company is authorized to own and permanently hold, in addition to its right of way, lands used for depot purposes, and reservations for machine shops, turnouts and switches, and including lands used for all necessary and convenient buildings and stations, fixtures and machinery for the accommodation and use of passengers, freight and business interests, or which m-y be necessary for the construction and operation of its railway. Unless lands are used for one or more of the above purposes, they are not used for railroad purposes, within the meaning of the issues submitted for your determination.

You are further instructed that lands purchased by a railroad

company for the purpose of subdividing the same into lots and selling the same to its employés are not purchased for railroad purposes within the meaning of the issues submitted for your determination.

Plaintiffs request the court to give to the jury the above special charge.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 8 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147.

Special charge No. 8 requested by plaintiffs.

40 The jury are instructed that the burden of proof is on the defendants in this case to show by a preponderance of the evidence and with reasonable certainty what land, if any, sued for by plaintiffs, was used for railroad purposes. Such evidence must be sufficient to enable you to describe said land with reasonable certainty, so that it may be definitely located on the ground. If the evidence is not sufficient to enable you to so definitely locate the land with reasonable certainty, you will find against defendants on the question of the location of the lands, and the form of your verdict will be as follows:

"We, the jury, finds that the evidence fails to locate with reasonable certainty the lands used by the railroad company for railroad purposes, and sued for by plaintiffs."

Plaintiffs request the court to give to the jury the above special charge.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Refused:
J. M. AVERY,
Special Judge.

Filed 7th day of July, 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 9 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 9 requested by plaintiffs.

GENTLEMEN OF THE JURY: You are instructed, at the request of the plaintiffs that the Texas Trunk Railroad Company, "No. 1," contracted to purchase the Hughes and Slaughter 25-acre tract and the Gaston tract, called "the flat-iron tract," about or practically the same time, and made railroad improvements on both
41 tracts about the same time, and whether the 25-acre tract or the Gaston tract, or both, were purchased for terminal use, is a question of fact for you, under the special issues submitted to you by the court.

Respectfully requested.

DICKSON & MORONEY,
ALEXANDER, CLARK & THOMPSON,
Attorneys for Plaintiffs.

Refused:

J. M. AVERY,
Special Judge.

Filed 7th day of July, A. D. 1899.

H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 10 Requested by Plaintiffs Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 10 requested by plaintiffs.

GENTLEMEN OF THE JURY: You are instructed, at the request of plaintiffs, that the uncontradicted evidence shows that the Texas Trunk Railroad Company never acquired the title to the right of way used by it over what is known as the Gaston "flat-iron tract"

and the other tract of land of Gaston south of the Hughes and Slaughter 25-acre tract of land.

Respectfully requested.

DICKSON & MORONEY,
ALEXANDER, CLARK & THOMPSON,
Plaintiffs' Attorneys.

Refused:
J. M. AVERY,
Special Judge.

Filed July 7th, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

42 *Special Charge No.* 1 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 1 requested by defendants.

GENTLEMEN OF THE JURY: The plaintiffs having failed to show title to the property sued for, you are instructed to return a verdict in favor of the defendants.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7th day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 2 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 2 requested by defendants.

GENTLEMEN OF THE JURY: It appearing that the judgment in the case entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, No. 4333, rendered by the district court of Dallas county, Texas, which has been admitted in evidence before you, was rendered after the defendant corporation was dissolved, you are in-

structed to exclude said judgment from consideration in arriving at your verdict in this case.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed July 7th, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

43 *Special Charge No. 3 Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147.

Special charge No. 3 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed to exclude from consideration in arriving at your verdict in this case, the evidence of the execution issued upon a judgment of W. F. Thompson *vs.* Texas Trunk Railroad Company, in the district court of Dallas county, Texas, and of the levy of said execution, and the sale and deed made in pursuance thereof, which has been admitted in evidence before you on behalf of the plaintiffs herein.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 4 Requested by Defendants Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147.

Special charge No 4 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the judgment of the district court of Dallas county in and for the 44th judicial district, in favor of C. C. Bumpas, as trustee for J. E. Downs

and associates, rendered April 7, 1898, in cause No. 14047, entitled C. C. Bumpas *vs.* John F. Ely *et al.*, in so far as the same is against John F. Ely, James B. Simpson, W. L. Cabell and D. A. Robinson, as surviving directors and trustees of the Texas Trunk Railroad Company, as originally incorporated etc., is void, and you
44 will exclude same from consideration in arriving at your verdict in this case.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 5 Requested by Defendants Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 17147.

Special charge No. 5 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the judgment of the district court of Dallas county, Texas, in and for the 44th judicial district, rendered April 7, 1898, in cause No. 14047, upon the docket of said court, entitled C. C. Bumpas *vs.* John F. Ely, *et al.*, in so far as the same is against the Texas Trunk Railroad Company is void, and you will exclude the same from consideration in arriving at your verdict in this case.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 6 Requested by Defendants Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 6 requested by defendants.

45 GENTLEMEN OF THE JURY: You are instructed that the judgment of the district court of Dallas county, Texas, in and for the 44th judicial district, rendered April 7, 1898, in cause No. 14047, entitled C. C. Bumpas *vs.* John F. Ely *et al.* in so far as the same is against John H. Gaston, as receiver, etc., which has been admitted in evidence before you, is inadmissible as evidence of title in plaintiffs, and you will exclude the same from consideration in arriving at your verdict in this case.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 7 Requested by Defendants Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 7 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the deeds executed by James B. Simpson, John F. Ely, D. A. Robinson and W. L. Cabell, as directors and trustees of the Texas Trunk Railroad Company, to C. C. Bumpas, trustee, etc., which have been admitted in evidence before you, are void, and you will exclude the same from consideration in arriving at your verdict in this case.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

46 *Special Charge No. 8 Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 8 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered on the 31st day of January 1883, foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company, as trustee, and ordering the sale of the property embraced in said mortgage, and the subsequent decree of said court in said cause, rendered on June 6, 1883, which decrees have been introduced in evidence before you, and the sales made under and in pursuance of said decrees, embraced the property sued for in this cause, and were effectual to vest title to the same in those under whom defendants claim, and you are therefore instructed to return a verdict in favor of the defendants.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 9 Requested by Defendants Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 9 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the decree of foreclosure and sale rendered by the circuit court of the United States in and for the northern district of Texas, at Dallas,
47 in cause No. 193 upon its equity docket, foreclosing the mortgage previously executed by the Texas Trunk Railroad Company to the Central Trust Company of New York, as trustee, and ordering the sale of the property covered by said mortgage, and

the sale made under and in pursuance of said decree to defendant, Edward H. Pardee, embraced the property involved in this suit, and was effectual to vest the title to said property in the said Edward H. Pardee, and you are therefore instructed to return a verdict in favor of the defendants.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 10 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 10 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered on the 31st day of January, 1883, foreclosing the mortgage previously executed by the Texas Trunk Railroad Company to the International Trust Company, and ordering the sale of the property covered by said mortgage, and the subsequent decree of said court in said cause, rendered June 6, 1883, and the sale made under and in pursuance of said decrees, embraced and was effectual to, and did vest in those under whom defendants claim, the title to the second and fourth tracts of land described in plaintiffs' first amended
48 original petition in this case; that is to say, the twenty-five (25) acre tract described *in* metes and bounds in subdivision (*b*) and the 11.92-acre tract described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 11 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 11 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the decree of foreclosure and sale rendered by the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 193, upon its equity docket, February 26, 1895, foreclosing a mortgage previously executed by the Texas Trunk Railroad Company to the Central Trust Company of New York, as trustee, and ordering the sale of said property, and the sale made under and in pursuance of said decree, embraced and was effectual to, and did, vest in defendant, Edward H. Pardee, the title to the second and fourth tracts of land described in plaintiffs' first amended original petition in this case; that is to say the 25-acre tract described *in*
metes and bounds in subdivision (*b*) and the 11.92-acre tract
49 described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 12 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 12 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 275 upon its equity docket in

favor of George T. Atkins, as receiver, etc., and against C. T. Campbell *et al.*, rendered on July 16, 1895, which, with the original bill of complaint in said cause, has been introduced in evidence before you, was effectual to establish and bring into the custody of said court, through George T. Atkins, as receiver, in equity cause No. 193 upon the docket of said court, the two tracts of land described in plaintiffs' first amended original petition in this case; that is to say, the 25-acre tract described by metes and bounds in subdivision (*b*) and the 11.92-acre tract described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land.

50 BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 13 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 13 requested by defendants.

GENTLEMEN OF THE JURY: It appearing from the uncontradicted evidence that the deeds executed by W. L. Cabell, Jno. F. Ely, J. B. Simpson and D. A. Robinson, as trustees of the sold-out Texas Trunk Railroad Company, to C. C. Bumpas, as trustees, etc., which have been introduced in evidence, were without consideration and in abdication and violation of the trust vested in said Cabell, Ely, Simpson and Robinson by law and in abuse of said trust, you are instructed to disregard said deeds in arriving at your verdict.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge.

Filed 7 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 14 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Special charge No. 14 requested by defendants.

GENTLEMEN OF THE JURY: It appearing from the uncon-
51 tradicted evidence that the judgment in cause No. 14047, entitled C. C. Bumpas trustee, etc. *vs.* Jno. F. Ely *et al.*, rendered by the 44th judicial district court of Dallas county, Texas, on April 7, 1898, was as between said C. C. Bumpas, plaintiff, therein, W. L. Cabell, Jno. F. Ely, J. B. Simpson, D. A. Robinson, as trustees of the sold-out Texas Trunk Railroad Company was with the acquiescence and consent of said trustees in pursuance of their previous abdication and violation of their trust by the deeds executed by them to C. C. Bumpas, trustee, (which deeds you are also instructed to disregard) you are instructed to disregard said judgment in arriving at your verdict.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 15 *Requested by Defendants Refused.*

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
EDW. H. PARDEE ET AL. } No. 17147.

Special charge No. 15 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the right of the Texas Trunk Railroad Company to purchase, own and mortgage land was not confined to such as was needed at the time of purchase under the circumstances then existing, but that it had the right under the law to purchase, own and mortgage such land as would have been reasonably necessary for stations, switches, yards, shops and other proper terminal facilities, had it completed and put

in operation the entire lines of railroad it was at the time authorized by its charter to construct and operate.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

52 Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Special Charge No. 16 Requested by Defendants Refused.

Filed July 7th, 1899.

A. D. ALDRIDGE ET AL.
vs.
EDW. H. PARDEE ET AL. } No. 17147.

Special charge No. 16 requested by defendants.

GENTLEMEN OF THE JURY: You are instructed that the Texas Trunk Railroad Company had the right under the law to purchase, own and mortgage such land as was at the time, or as would have been upon the completion of the entire lines authorized by its charter to be built, reasonably necessary for use as sand or material in constructing, repairing or improving its railroad then existing or authorized by its charter to be constructed.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Refused:
J. M. AVERY,
Special Judge, Presiding.

Filed 7 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Plaintiffs' Motion for Judgment.

Filed July 10th, 1899.

In District Court, Dallas County, Texas, 44th Judicial Circuit.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Now come plaintiffs in said cause and show to the court that on the verdict and findings of the jury, and on the undisputed evidence,

they are entitled to judgment as prayed for by them in their petition.

Wherefore they pray that such judgment be rendered, and for general relief, etc.

53 ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Filed 10 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Motion to Enter Judgment.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 17147.

Now come the defendants in the above numbered and entitled cause, and upon the evidence in this cause and the verdict of the jury herein move the court to enter judgment with the plaintiffs by their action herein against defendants as to the Hughes and Slaughter twenty-five-acre tract of land situated in the city of Dallas described by metes and bounds in subdivision (*b*) of plaintiffs' first amended original petition herein, and the 11-92/100-acre tract of land in Dallas county described by metes and bounds in subdivision (*d*) of plaintiffs' first amended original petition, and that as to said tracts of land defendants go hence without day.

Defendants pray for such other and further relief as they may be entitled to in law or equity in the premises.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Filed 25 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas Co., Texas,
By CALHOUN KNOX, *Deputy.*

Judgement.

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 17147. Entered as of July 25th, 1899.

THURSDAY, *July 27th*, 1899.

54 On the 3rd day of July, 1899, the above entitled and numbered cause came on for trial before the Hon. John M. Avery, special judge presiding, and a jury, both parties, plaintiffs and defendants, appeared by their respective attorneys, and announced ready for trial.

Thereupon came on to be heard the demurrers of the defendants as presented by their first amended original answer to plaintiffs' first amended original petition.

Which demurrers were argued by counsel, and the court being of the opinion that the said demurrers should not be sustained it is ordered, adjudged and decreed by the court that they be and are hereby overruled, to which ruling of the court defendants excepted.

And then came a jury of good and lawful men, to wit: K. J. Kivlen and eleven others, who having been duly sworn and empaneled, and after hearing the evidence from day to day until the 7th day of July, 1899, and after hearing the arguments of the counsel and the charge of the court, submitting said cause on special issues, retired to consider of their verdict, and after consideration the jury on the 8th day of July, 1899, returned into court the following verdict in response to said issues submitted to them:

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

GENTLEMEN OF THE JURY: As to all the land sued for, except the 25 acres bought from Hughes and Slaughter, and described as tract No. *b* in plaintiffs' petition and the 11-92/100-acre tract bought from Mays and wife, and described as tract No. *d*, in plaintiffs' petition, you will find for the plaintiff-, leaving out the right of way over all said land, and as to these tracts the form of your verdict will be as follows:

(1.) "We, the jury, find for the plaintiffs all the land sued for
55 save and except the right of way of the Texas Trunk railroad through the towns of Kaufman and Crandall as shown on the maps of said towns recorded in vol. 50, page 163 and vol. 33, page 606, of the deed records of Kaufman county, Texas, and save and except a right of way one hundred feet in width on each side of the center of the main track of the Texas Trunk railroad where it may cross any of said land, and also save and except the 25-acre tract bought from Hughes and Slaughter and described as tract No. *b* in plaintiffs' petition and the 11-92/100-acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition.

K. J. KIVLEN, *Foreman.*"

As to said 25-acre tract bought from Hughes and Slaughter and the 11-92/100-acre tract bought from Mays and wife, the case will be submitted to you on special issues. As to some of the facts connected with these two tracts the evidence is not conflicting, and in regard to the following facts you will return the following two answers:

(2.) "We, the jury, find that the 25-acre tract described in plaintiffs' petition as tract No. *b* was bought by the Texas Trunk railroad from Hughes and Slaughter, the deed is dated March 8th 1880, but was not delivered until several months thereafter, but during the

year 1880, at the time it was purchased, it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the railroad and whatever switches and side tracks should be necessary in the operation of the road, and if these did not occupy all of the land then to sell lots on the eastern side of the land to its employés so that they might be near their work; no such sales have ever been made, nor has any part of the land been subdivided into lots; the railroad built its main track across the land near its western
56 boundary, and also built a side track on it and a Y near the center of it extending eastwardly across the land to beyond the center of the land and also a small house used as a ticket office and car shed; it used in the operation of its road up to 1892 the main and side track and houses; this was the only land the road owned in Dallas where it terminated; both as originally contemplated and as actually constructed, if the road had been properly constructed and operated it would have needed as much as 25 acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of such construction and operation.

K. J. KIVLEN, *Foreman.*"

(3.) "We, the jury, find that the 11–92/100-acre tract described in plaintiffs' petition as tract No. *d* was bought by the Texas Trunk railroad from Mays and wife on February 2nd, 1881; it had on it sand; at the time of its purchase it was the purpose and intention of the railroad company, and its officers, to use the sand in the construction and ballasting of the road-bed, and also to place on it such switches and side tracks as might be necessary in the operation of the road; the main track of the road was built across it near its eastern boundary, and also a spur track running out from the main track (but near to it) across the land so as to reach the sand; sand has since been taken from the land and used in the construction and repairing and ballasting the road; the road has thus occupied about two acres of the tract; if the road was properly constructed and operated it would be necessary to use sand in order to do so properly and successfully.

K. J. KIVLEN, *Foreman.*"

You will find from the evidence and answer the following special issues No. 3*a* and 3*b*:

3*a*. Was the said 11–92/100-acre tract bought by the Texas
57 Trunk Railroad Company for use, either immediate or prospective, in the construction, repair or improvement of its railroad?

Answer. No.

K. J. KIVLEN, *Foreman.*

3*b*. Was the said 11–92/100-acre tract mentioned in the last preceding question reasonably necessary in 1880 or in 1888 for then present or the prospective use of the Texas Trunk Rail-

road Company in the construction, repair or improvement of its railroad then built or authorized by its charter to be built and operated?

Answer. No.

K. J. KIVLEN, *Foreman.*
J. M. AVERY,
Special Judge.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs request the court to submit to the jury the following special issues:

Fourth Special Issue.

Was all or any part of that portion of the Hughes and Slaughter 25-acre tract sued for by plaintiffs originally acquired by the Texas Trunk Railroad Company for the purpose of subdividing the same into lots and selling the same to employés of the company?

Answer. Yes.

K. J. KIVLEN, *Foreman.*

Fifth Special Issue.

If you answer the fourth special issue in the affirmative, and if you further find that only a part of said tract was acquired for the purposes stated, that is, of subdivision into lots and sale thereof, then state what part of said tract was so intended, describing the same in your answer.

Answer. All but 100 feet off the west boundary line of said
58 tract of land.

K. J. KIVLEN, *Foreman.*

Sixth Special Issue.

Was any part of that portion of the 25 acres sued for by plaintiffs actually used by the railroad company, in connection with the operation of the railroad, at the date of the International Trust Company mortgage, March 22, 1880; if so, how was it used, and what part of said land was so used, describing it particularly.

Answer. No.

K. J. KIVLEN, *Foreman.*

Seventh Special Issue.

It appearing by the evidence that when said International Trust Company mortgage was foreclosed on January 31, 1883, a portion of the 25-acre tract was used by the railroad company for a Y to switch cars, turn the locomotive, etc., you will answer:

First. Describe the land that was then so used, including so much of said land as was reasonably necessary in connection with said use.

Answer. No evidence that any Y existed at that date.

K. J. KIVLEN, *Foreman.*

Second. Was such use of a permanent character, and so intended at the time; or was such use then intended as only of a temporary character?

Answer. Any part of said 25 acres used by said railroad company at that date except 100 feet on west boundary line was only of a temporary character.

K. J. KIVLEN, *Foreman.*

Eighth Special Issue.

Was any part or all that portion of the land that was formerly used as a Y so used when the Central Trust Company mortgage was executed, August 30, 1888? If so, state whether it was all
59 the land formerly so used, or only a part, and if only a part, describe such part of the land particularly.

Answer. No evidence that any part of said Y was used by the railroad company on August 30, 1888.

K. J. KIVLEN, *Foreman.*

Ninth Special Issue.

Had that part of the 25-acre tract sued for and formerly occupied as a Y been permanently abandoned for such use when the Central Trust Company mortgage was foreclosed on February 26, 1895?

Answer. Yes.

K. J. KIVLEN, *Foreman.*

Tenth Special Issue.

Did the railroad company, under any of its organizations ever actually use for railroad purposes, or in connection with the operation of the railroad, any part of that portion of the 25-acre tract sued for by plaintiffs, other than so much of said land as was occupied by said Y?

Answer. No.

K. J. KIVLEN, *Foreman.*

Eleventh Special Issue.

Considering the reasonable intentions and actual or probable present and future needs of the railroad company when the International Trust Company mortgage was executed on March 22, 1880, was all or any part of that portion of the 25 acres sued for by plaintiffs then reasonably necessary for the construction, equipment or operation of the railroad?

Answer. None.

K. J. KIVLEN, *Foreman.*

If you answer that all was not, but that a part was necessary, then state what part was so necessary, describing it in your answer.

60 *Twelfth Special Issue.*

Considering the reasonable intentions and actual or probable present and future needs of the railroad company when the International Trust Company mortgage was foreclosed on January 31, 1883, was all or any part of that portion of the 25 acres sued for by plaintiffs then reasonably necessary for the construction, equipment or operation of the railroad? If you answer that all was not but that a part was so necessary, then state what part was so necessary.

Answer. None.

K. J. KIVLEN, *Foreman.*

Thirteenth Special Issue.

Considering the reasonable intentions and actual or probable, present and future needs of the railroad company when the Central Trust Company mortgage was executed on August 30, 1888, was all or any part of that portion of the 25 acres sued for by plaintiffs then reasonably necessary for the construction, repairs, renewals, improvements, completions, operation or management of the railroad. If you answer that all was not, but that a part was so necessary, then state what part was so necessary.

Answer. None.

K. J. KIVLEN, *Foreman.*

Fourteenth Special Issue.

Was all or any part of that portion of the Mays 11–92/100-acre tract sued for by plaintiffs originally acquired by the railroad company for the purpose of subdividing the same into lots and selling the same to the employés of the company?

Answer. Yes, all.

K. J. KIVLEN, *Foreman.*

Fifteenth Special Issue.

If you answer the fourteenth special issue in the affirmative, and if you further find that only a part of said tract was ac-
61 quired for the purposes stated, that is, of subdividing into lots and sale thereof, then state what part of said tract was so intended, describing the same in your answer.

Answer. —.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Given:
J. M. AVERY,
Special Judge.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs request the court to submit to the jury the following special issues:

DICKSON & MORONEY,
Attorneys for Plaintiffs.

Sixteenth Special Issue.

Was the railroad company actually using the Y on the 25-acre tract when the Central Trust Company mortgage was executed on August 30, 1888?

Answer. No.

K. J. KIVLEN, *Foreman.*

Seventeenth Special Issue.

If you answer the above special issue (sixteenth) in the negative, then had the use of said Y by the railroad company been permanently abandoned by the railroad company when said Central Trust Company mortgage was executed on August 30, 1888?

Answer. No evidence of the Y being there at that date.

K. J. KIVLEN, *Foreman.*
ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Given:
J. M. AVERY,
Special Judge.

62 *Eighteenth Special Issue.*

The court submits the following additional issue:

What was the nearest point of the Y on the 25-acre tract (at any time) from the eastern boundary of said tract?

J. M. AVERY,
Special Judge.

Answer. 275 feet.

K. J. KIVLEN, *Foreman.*

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs request the court to give to the jury the following special issue:

Nineteenth Special Issue.

When the Hughes and Slaughter tract was acquired by the railroad company, was it then the intention of the railroad company to

use the Gaston tract (testified to as the "flat-iron" tract) for its terminal, and to place thereon its depot and shops, or any of said structures?

Answer. Yes.

K. J. KIVLEN, *Foreman*,
ALEXANDER, CLARK & THOMPSON,
Attorneys for Plaintiffs.

Given:
J. M. AVERY,
Special Judge.

Which verdict was approved by the court.

And now on this the 25th day of July, 1899, came on to be heard the motions of the parties, plaintiffs and defendants, for judgment, and the court upon consideration of the findings of the jury, and the evidence is of the opinion that the law is for the plaintiffs as to all the property sued for, except the property embraced in the mortgage of the Texas Trunk Railroad Company to the International Trust Company, trustee, of date March 22, 1880, and the decree of the United States circuit court, foreclosing said mortgage and the mortgage of the Texas Trunk Railroad Company to the Cen-
63 tral Trust Company of New York, trustee, of date August 30, 1888, and the decree of the United States circuit court foreclosing same.

And the court is of the opinion that as to all the lands embraced in said mortgages and foreclosure decrees, the law is for the defendants.

The court is of the opinion that tracts describe in subdivisions (*b*) and (*d*) of plaintiffs' first amended original petition are embraced in both said mortgages and the decree foreclosing the same, and that none of the other lands sued for by plaintiffs are embraced in either of said mortgages or the decrees foreclosing the same.

It is therefore on this the 25th day of July, 1899, ordered, adjudged and decreed by the court that plaintiffs A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes and associates, do have and recover of and from defendants, Edward H. Pardee and Collis P. Huntington, the following-described lands, to wit:

(*a.*) In Dallas county, Texas, 25 acres, more or less; beginning at the N. W. corner of the Lewis Sweet 130 acres; being a part of the S. A. & M. G. R. R. sur. on Prairie creek; thence E. with the N. line of said 130 acres 475–2/10 vrs. a corner; thence S. 356–4/10 vrs.; thence in a N. W. course to a point 237–6/10 vrs. S. of the beginning and in the W. line of said S. A. & M. G. R. R. sur.; thence N. 237–6/10 vrs. to the beginning, containing 25 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by Lewis Sweet and wife, by deed bearing date *the* March 8th, 1880, and recorded in vol. 49, page 207, deed records, Dallas county, Texas.

(*c.*) In Dallas county, Texas, and being a part of 76⅓ acres out of the Robert Kleburg league, said 76⅓ acres being deeded to Thomas L. Bradshaw, by Marshall E. Kleburg, and described as follows, to wit:

Beginning at the most western corner of said 76½ acres a stake; thence N. 45 E. to and with the N. W. line of said tract to a stake on Mrs. Daugherty's S. corner; thence S. 45 E. far enough so as to include 5 acres by running S. 45 W. parallel with the first-named line to a stake in the S. E. boundary of said 76½ acres; thence N. 45 W. to the place of beginning, containing 5 acres of land.

64 Being the same land deeded to the Texas Trunk Railroad Company by Thomas L. Bradshaw by deed bearing the date the 3rd day of March, 1880, and recorded in vol. 49 p. 195, deed records, Dallas county, Texas.

Kaufman County Lands.

(*e.*) In Kaufman county, Texas, to wit: forty acres of land out of an undivided interest in the S. half of the J. McCarty survey situated in said Kaufman county, Texas; beginning at a stake S. E. corner of J. W. Moore survey and the N. E. corner of Silas Endum survey from which a P. O. 2 ft. in dia. brs. N. 36 E. 143 vrs.; a black-jack 15 in. dia. brs. N. 36 . . . 14 vrs.; thence N. 3801–6/10 vrs. to stake from which a locust 12 in. dia. brs. S. 42 E. 10 vrs. another 10 in. dia. brs. S. 18 E. 9 vrs.; thence E. 950–4/10 vrs. to a stake from which an elm 15 in. dia. brs. S. 2 W. 6 vrs.; thence S. 3810 vrs. to a stake from which a P. O. 12 in. dia. brs. N. 65 W. 112 vrs.; thence W. 950–4/10 vrs. to the place of beginning. Said forty acres *is* more particularly described as follows: Beginning at the S. W. corner of the I. N. Hamilton 120-acre tract in said McCarty survey, a point 1187 varas N. of the S. W. corner of said survey, from which a P. O. 18″ dia. bears S. 39½ E. 9.6 vrs. do. bears N. 12 E. 13 vrs.; thence E. with said Hamilton's south line 950–4/10 vrs. to Hamilton's S. E. corner, from which an elm 7″ dia. brs. N. 21 E. 7 vrs. an elm 30 in. dia. brs. S. 45½ west 25.1 vrs.; thence south a sufficient distance so that a line drawn west 950.4 vrs. paralled with said Hamilton's south line, thence north to beginning point, will include forty acres of land, said forty acres fronting 950.4 vrs. on said Hamilton's south line, and running south for quantity. Being the same land deeded to Texas Trunk Railroad Company by C. R. Nash, by deed bearing date the 9th day of September, 1881, and recorded in vol. 30, p. 193, deed records, Kaufman county, Texas.

(*f.*) A part of the Chas. Askins league and labor, lying and being situated in said Kaufman county about 2 miles S. from the town of Kaufman; beginning 1794 vrs. N. 40 W. from a stake on the W. bank of Cottonwood creek, from which a hackberry bears N. 62 W. 4 vrs. and another bears W. 6 vrs.; thence S. 45 W. 337½ vrs. stake; thence N. 45 W. 786–2/100 stake; thence N. 45

65 E. 337½ vrs. stake; thence S. 45 E. 786–7/100 to beginning, containing forty-seven acres of land. Being the same land deeded to the Texas Trunk Railroad Company by J. C. Maples by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 195, deed records, Kaufman county, Texas.

(*g.*) A part of the R. H. Love 622-acre survey: Beginning at the N. E. corner of said survey; thence S. 750 vrs.; thence W.

383 vrs.; thence S. 56 vrs.; thence W. 90 vrs.; thence N. 806 vrs.; thence E. 473 vrs. to beginning. Being the same land deeded to Texas Trunk Railroad Company by J. K. Love by deed bearing date the 9th day of September, 1881, and recorded in vol. 30, p. 197, deed records of Kaufman county, Texas.

(*h.*) Being a part of the Peter E. Bean 26-labor survey situated in said Kaufman county. Beginning at the S. E. corner of Mrs. Gutherie's 320-acre survey at a stake from which a mesquite 5 in. dia. brs. S. 56 W. 14 vrs. another mesquite *brs.* 5 in. dia. brs. S. 24 E. 23–5/10 vrs.; thence E. 426 vrs. stake; thence N. 300 vrs. stake; thence W. 150 vrs. stake; thence N. 960 vrs. stake in prairie; thence W. crossing branch 276 vrs. stake in prairie; thence S. 1223 vrs. to place of beginning, containing 68 acres. Being the same land deeded to the Texas Trunk Railroad Company by J. D. Echols by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 198, deed records of Kaufman county, Texas.

(*i.*) A part of the Thomas Jefferson ⅓-league survey in the said county of Kaufman. Beginning at the N. corner of 132½ acres of said Thomas Jefferson land deeded by George Barnett and wife to H. P. Nash on the 7th day of April, A. D. 1871, a post in brush from which an elm 5 in. dia. brs. S. 15 W. 5 vrs. elm 4 in. dia. N. 27 W. 4 vrs. dist.; thence S. 45 E. 564 vrs. corner; thence N. 45 E. 499 vrs. corner, the N. corner of said Jefferson survey; thence N. 45 W. 564 vrs. the N. corner of said Jefferson survey; thence S. 45 W. 499 vrs. to the place of beginning, containing 50 acres, more or less. Being the same land deeded to the Texas Trunk Railroad Company by George Barnett by deed bearing date the 7th day of Sep-
66 tember, 1881, and recorded in vol. 30, p. 200, deed records of Kaufman county, Texas.

(*j.*) Forty acres of land of an undivided interest in the S. E. half of the J. McCarty survey situated in said Kaufman county: Beginning at stake S. E. corner of S. W. Moore survey and the N. E. corner of Silas Endum survey from which a P. O. 2 ft. in dia. brs. N. 36 E. 143 vrs.; a black-jack 15 in. dia. brs. N. 36 . . . 14 vrs.; thence N. 3801 vrs. to a stake from which a locust 12 in. dia. brs. S. 42 E. 10 vrs.; another 10 in. dia. brs. S. 18 E. 9 vrs.; thence E. 950–4/10 vrs. to stake from which an elm 15 in. dia. brs. S. 2 W. 6 vrs.; thence S. 3810 vrs. to stake from which a P. O. 12 in. dia. brs. N. 65 W. 112 vrs.; thence W. 950–4/10 vrs. to place of beginning. Being the same land deeded to the Texas Trunk Railroad Company by B. S. Wood, by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 201, deed records, Kaufman county, Texas.

(*k.*) Lots 2 and 3 in block No. 14, as shown and described in Book 1, page 133, on file in the county clerk's office of Kaufman county, to which reference is made. Being the same land deeded to the Texas Trunk Railroad Company by Wm. H. Barnes by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, page 199, deed records, Kaufman county, Texas.

(*l.*) Being an undivided half of 20 acres deeded to Wood and Nash by W. H. Pyle; beginning at the N. corner of 32 acres deeded to George Ezell by said Pyle and being a part of J. B. Cole 26-labor

survey in Kaufman county, from which a P. O. 16 in. dia. brs. N. 31 W. 10 vrs. dist. P. O. 12 in. dia. brs. S. 60 E. ½ vr. dist.; thence N. W. 600 vrs. corner from which a P. O. 12 in. dia. brs. N. 82 . . . 17 vrs. dis. an elm 8 in. dia. brs. N. 72 E. 21 vrs. dist.; thence S. 45 W. 189 vrs.; thence S. 45 E. 600 vrs. corner; thence N. 45 E. 189 vrs. to the beginning. Being the same land deeded to the Texas Trunk Railroad Company by B. S. Wood by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 202, deed records, Kaufman county, Texas.

(*m.*) A part of the G. W. Brack survey situated in said county of Kaufman near Old Trinidad, it being a part of a tract set
67 apart by the commissioners in the case of James Shaw *vs.* R. B. Shaw, for partition in the district court of said county to Rhoda Carlisle. Beginning at the N. E. corner of said tract; thence W. 1286 vrs. the N. W. corner of said tract; thence S. 336 vrs.; thence E. 475 vrs.; thence S. 183 vrs.; thence E. 811 vrs.; thence N. 519 vrs. to the place of beginning, containing 100 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by A. E. Carlisle, by deed bearing date the 16th day of September, 1881, and recorded in vol. 30, p. 203, deed records, Kaufman county, Texas.

(*n.*) Being a part of the John Spikes headright survey for 640 acres, situated in Kaufman county, Texas, on the waters of Cedar creek. Beginning at the N. E. corner of the said Spikes survey; thence S. 672 vrs. corner; thence W. 672 vrs. corner; thence N. 672 vrs. corner on N. boundary line of said Spikes survey; thence E. 672 vrs. to the place of beginning, containing 80 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by Henry Erwin and wife, Nannie Erwin, by deed bearing date the 4th day of October, 1881, and recorded in vol. 30, p. 286, deed records, Kaufman county, Texas.

(*o.*) Situated in the county of Kaufman, State of Texas, on the waters of Lacy creek, being a part of the survey originally granted to M. F. Sims and described as follows, to wit: An undivided interest of 60 acres of land out of a 250-acre tract in said original survey in the name of M. F. Sims, which survey is situated about 18 miles S. E. of the town of Kaufman, in said Kaufman county, on said Lacy creek, a tributary of Cedar creek, and for a more particular description of said land reference is here made to the records of deeds for Kaufman county, containing 60 acres of land. Being the same land deeded to the Texas Trunk Railroad Company by J. S. Woods, by deed bearing date the 22nd day of August, 1881, and recorded in vol. Y, p. 251, deed records, Kaufman county, Texas.

(*p.*) All of blocks Nos. 5, 7, 9, 11, 13, 43, 45, 15, 23, 25, 29, 31, 33, 27, 83, 59, 61, 63, 67, 71, 73 and 79, and fractional blocks Nos. 17, 75, 65, 77, and 69 and half blocks Nos. 39 and 41, and quarter blocks Nos. 51, 53 and 55, and half blocks Nos. A, C, in the town of
68 Kemp in Kaufman county, Texas, being the same land deeded to the Texas Trunk Railroad Company by A. J. Still and wife, M. B. Still, by deed bearing date the 6th day of October, 1883,

and recorded in vol. 34, p. 107, deed records, Kaufman county, Texas.

(*q.*) Situated in the town of Kemp, Kaufman county, Texas; beginning at the N. E. corner of 50 acres of land sold to J. J. Hudman by J. S. Ables, said land being a part of the J. S. Ables survey; thence W. to line running S. 25 E. from S. E. corner of block No. 64 in said town; thence S. 23 E. to the E. line of said 50 acres, thence N. to the place of beginning. Being the same land deeded to the Texas Trunk Railroad Company by S. M. Hudman by deed bearing date the 6th day of October, 1883, and recorded in vol. 33, p. 614, deed records, Kaufman county, Texas.

(*r.*) Situated in the county of Kaufman, State of Texas, and about ½ of a mile E. of the court-house of Kaufman county, being a part of the J. B. Cole and Thos. Beedy surveys or leagues; beginning at the N. corner of A. L. Carter's 320-acre survey a bois d'arc stake on Kemp and Kaufman road; thence N. 8′ 30″ W. mag. 1684 feet a stake on prairie 37 feet from the center of H. & T. C. R'y; thence N. 79 E. mag. 168 feet to the center of the Texas Trunk railroad; thence on and in same direction 50 ft. a stake, being 50 ft. from the center line of the Texas Trunk railroad; thence S. 12 E. mag. parallel with and 50 ft. from the center line of said Texas Trunk railroad 2011 feet to corner on prairie; thence S. 78 W. mag. 50 ft. to center of Texas Trunk railroad; thence N. 53′ 30″ W. mag. 439–4/10 ft. to point of beginning, in all 12½ acres of land, more or less, being about 7⅔ acres exclusive of the 100 feet of right of way of the Texas Trunk railroad, the same being a part of our homestead and being all that part of our land lying W. of the Texas Trunk railroad not heretofore deeded to the Houston & Texas Central railroad under date of July 29th, 1882, and the W. boundary line being further defined by the E. side or line of Houston street and Henderson street produced. Being the same land deeded to the Texas Trunk Railroad Company by H. T. Nash and wife, L. J. Nash, by deed bearing date the 23rd day of May, 1890, and recorded in vol. 51, p. 167, deed records, Kaufman county, Texas.

69 (*s.*) Lots 1, 3, 5, 7, 9, and 11, block 1; lots 1, 3, 5, 7, 9 and 11, block 2; lots 1, 3, 5, 7, 9 and 11, block 3; lots 1, 3, 5, 7, 9 and 11, block 4; lots 3, 7, 9, block 10; lots 5, 7, 9 and 11, block 11; and lots 5, 7, 9, and 11, in block 13; in the town of Crandall, county of Kaufman, Texas. Being the same land deeded to Wm. G. Mowry, gen. mngr. of the Texas Trunk Railroad Company by C. F. Crandall and wife, by deed bearing date the 14th day of June, 1886, and recorded in vol. 39, p. 567, deed records, Kaufman county, Texas.

(*t.*) Being a part of the headright of Leonard Williams. Beginning at the E. corner of a survey of 320-acre survey deeded by the executors of the estate of John C. Kennedy deeded to Catherine H. Chester, from which a hickory 13 in. dia. brs. S. 32 E. 4 vrs.; a P. O. 14 in. dia. brs. N. 89 W. 15 vrs.; thence N. 67 W. 1250 to the N. W. corner of the same from—(8) which a hickory 14 in. dia. N. 82 W. 19 vrs. P. O. 13 in. dia. N. 47 E. 14 vrs.;

thence N. 25 E. 921 vrs. to corner in the S. W. boundary of the homestead; from which a red haw 3 in. in dia. N. 54 W. 8–1/10 vrs. a black haw N. 68 E. 84–1/10 vrs.; thence S. 12 E. to the S. corner of the homestead of Mrs. M. S. Kennedy, from which an elm 5 in. N. 51 E. 1–6/10 vrs.; and red oak S. 71 W. 181 vrs.; thence N. 51 E. to stake from which a hickory 6 in. S. 85 E. 15 vrs.; thence S. 67 E. 962 vrs. to the S. W. corner of the P. E. Bean ¼ league in S. E. boundary Leonard Williams league; thence S. 23 W. 1007 vrs. with said line to the beginning. Situated in the county of Houston, and said State of Texas, containing 215 acres. Being the same land deeded to the Texas Trunk Railroad Company by J. C. Maples by deed bearing date the 6th day of September, 1881, and recorded in vol. 30, p. 194, deed records, Kaufman county, Texas.

There is excepted from this recovery any and all lands above described that may be embraced in the right of way through the town of Kemp, as shown by the map of said town recorded in Kaufman County Deed Records, vol. 33, page 606, and through the town of Crandall, as shown by the map of said town recorded in Kaufman County Deed Records, vol. 48, page 241.

There is also excepted the right of way 100 feet in width on each side of the center of the main track of the Texas Trunk rail-
70 road whereever it may cross any of said lands above described.

It is further ordered, adjudged and decreed by the court that plaintiffs take nothing as to those two tracts of land described as follows:

(*b.*) Part of the John Grigsby league survey, and being a part of lot No. 5, in the division of said league; beginning at the E. corner of Jacob Bopp on the S. W. line of said lot No. 5; thence N. 45 E. 650 ft. to a corner; thence S. 45 E. 1680 ft. to corner; thence S. 45 W. 650 ft. said boundary line; thence N. 45 W. 1680 ft. on said boundary line to the beginning, containing 25 acres more or less. Being the same land deeded to the Texas Trunk Railroad Company by W. E. Hughes and wife, Annie E. Hughes, and C. C. Slaughter and wife, Cassie C. Slaughter, by deed bearing date the 13th day of March, 1880, and recorded in vol. 50, p. 162, deed records, Dallas county, Texas.

(*d.*) Situated in Dallas county, Texas, and being part of the Thomas Lagow league, and beginning at a bois d'arc post with a R. R. spike driven in it at the S. E. corner of Mays' land where he joins the S. W. corner of Galliher's lands; thence in a N. W. direction along the boundary line between said Mays' and said Galliher's land 600 feet to a stake; thence at right angles to said boundary line of said Mays' and Galliher's 919 ft. to a stake on the W. boundary of said Mays; and thence at right angles to said last-named line in a S. E. direction along the W. boundary of said Mays' land 600 ft. to a stake on boundary line between said Mays' and J. J. Good's land; thence at right angles to said W. line in an E. direction along the boundary line between said Mays and Good to the place of beginning, the same being 11–92/100 acres of land and being exclusive of land heretofore purchased by said railroad company for its right

of way; being the same land deeded to the Texas Trunk Railroad Company by S. R. Mays and wife, A. C. Mays, by deed bearing date the 2nd day of February, 1881, and recorded in vol. 48, p. 586, deed records, Dallas county, Texas.

And as to said two tracts of land last above particularly described, it is ordered that defendants go hence without day.

It is further ordered that plaintiffs have their writs of pos-
71 session for said tracts of land so recovered by them and above particularly described. And that plaintiffs recover of defendants all costs of suit in this behalf incurred, and that the officers of the court do have and recover of the parties the costs by them respectively incurred, for all of which let execution issue.

Plaintiffs except to said judgment in so far as it is against plaintiffs and defendants except to said judgment in so far as it is against defendants, and plaintiffs and defendants each in open court give notice of appeal to the court of civil appeals in and for the fifth supreme judicial district of Texas.

JOHN M. AVERY,
Special Judge, Presiding.

Plaintiffs' Motion to Reform Judgment and in the Alternative to Set Aside Verdict, etc.

Filed July 25th, 1899.

In District Court of Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Now come plaintiffs in said cause and respectfully pray that the court set aside the judgment heretofore rendered herein, in so far as said judgment is against plaintiffs and in favor of defendants for the two tracts of land described in subdivisions *b* and *d* of plaintiffs' first amended original petition, and to reform said judgment and render judgment in favor of plaintiffs for said two tracts, except 100 feet off the west side of tract *b* and 100 feet on each side of the main track of the Texas Trunk railroad where it passes through tract *d* for the following reasons:

I.

Under the verdict of the jury and the evidence plaintiffs are entitled to judgment for said tracts *b* and *d* with exceptions above stated and under no reasonable and proper construction of the verdict, and under no reasonable and proper conclusion from the evidence can any other judgment be properly rendered.

II.

The evidence and verdict of the jury established the following facts:

1st. That the Texas Trunk Railroad Company was a cor-
72 poration incorporated under the general laws of the State of Texas on November 6, 1879.

2nd. That on March 22, 1880, said railroad company executed to the International Trust Company a mortgage on its railroad which mortgage did not described either of said tracts of land, or refer to them in any way, but which merely purported to conclude, in addition to its road, and other property not mentioned in this suit, "property purchased and to be purchased for the construction and equipment of said road" and the "property of said company now acquired or which may be acquired in the State of Texas used for and pertaining to the operation of said railroad."

3rd. That when said mortgage was executed said company did not own either of said two tracts of land, but they were subsequently required by said railroad company before the foreclosure of said mortgage, and the deeds by which they were so acquired are the common source of title of the parties to this suit.

4th. That on January 31, 1883, said mortgage was foreclosed and the mortgaged property ordered to be sold, describing it substantially as in the mortgage, and not describing either of said tracts of land. And under said mortgage foreclosure the property ordered to be sold, was sold by M. F. Dickenson and others. Said foreclosure sale including the entire road-bed, track, franchises and chartered rights of said company, whereby said company as originally incorporated was dissolved as a corporation, and all of its property not embraced in said foreclosure sale became vested in its directors as trustees.

5th. That none of said two tracts, with the exceptions stated, were purchased or used by said original company for the construction or equipment of said road, nor were either of said tracts, with exceptions stated, in any way used for or pertaining to the operation of said railroad; that both of said tracts, with the exceptions stated, were acquired by said original company for the purpose of subdividing into lots, and selling same to employés of the company, and if any of said land was ever used for railroad purposes such was temporary and not of a permanent character, and does not appear to have existed either at the date of said mortgage or at the date of its foreclosure; and it is found by the jury, "that consider-
ing the reasonable intentions and actual or probable, present
73 or future needs of the railroad company none of said property was reasonably necessary for the construction, equipment or operation of the railroad either when said mortgage was executed or when it was foreclosed," and it appears from the evidence and the verdict of the jury that another tract of land lying between said tract *b* and the Texas and Pacific railroad was intended by said railroad company for its terminal upon which it intended to place its depots and shops and it is found by the jury that said tract *d* was not bought by the railroad company for use, either immediate or prospective, in the construction, repair or improvement of its railroad, and that it was not reasonably necessary, either in 1880 or 1888 for the then present or the prospective use of the railroad company

in the construction, repair or improvement of its railroad, then built or authorized by its charter to be built and operated.

6th. That said Dickenson and others, purchasers at said foreclosure sale, reorganized the company under its original charter, as provided by the Texas statutes, thus constituting what is designated in the record as Texas Trunk Railroad Company No. 2, and that the properties of this company, including its entire road-bed, track, franchises, and chartered rights, were subsequently sold under an order of sale from the United States circuit court, and under a judgment and executions from the district court of Dallas county, and all of said properties, etc., were purchased under said several writs by J. E. Schneider and others, who again reorganized said company, under said original charter, in accordance with the statute of Texas, thus constituting what is designated in the record as Texas Trunk Railroad Company No. 3, and that neither the second nor the third company ever had or obtained any title to either of said two tracts of land, and that neither of said companies No. 2 or No. 3, ever acquired any title to any of the properties of the first company, except such as were in fact embraced, by legally sufficient description, in said first foreclosure sale under the International Trust Company mortgage.

7th. That on August 30, 1888, said third company executed a mortgage to the Central Trust Company of New York, embracing its entire road-bed, track, franchises and chartered rights, but
74 not describing or embracing either of said tracts of land, *b* and *d*, but merely containing a general description purporting to embrace its property pertaining to said railroad "owned or to be owned by said party of the first part or used or acquired to be used or acquired by said party of the first part in and for the construction, repairs, renewal, improvements, completions, operation or management of the said railroad."

8th. That it is established by the evidence and findings by the jury that when said Central Trust Company mortgage was executed, "considering the reasonable intention, actual or probable, present or future needs of the company no part of said two tracts, with the exceptions stated, was then reasonably necessary for the construction, repairs, renewal, improvements, completions, operation or management of the railroad," and that any part of said tracts claimed by plaintiffs, which may have been previously used for railroad purposes, had then been abandoned for any such use.

9th. That on September 14, 1891, in the district court of Ellis county and in a suit instituted against said company No. 3, by the State of Texas on September 25, 1889, a final judgment was rendered forfeiting the charter of said company and dissolving said corporation and appointing John H. Gaston receiver of all the said company's property, which judgment was affirmed by the supreme court on January 15, 1892, and is still in full force and effect, and that immediately upon such affirmance said Gaston duly qualified, and is still acting as such receiver.

10th. That on January 26, 1895, in the United States circuit court, in a suit therein pending, wherein said Central Trust Company was

complainant and said John H. Gaston receiver of said Texas Trunk Railroad Company was defendant, a decree was rendered foreclosing said Central Trust Company's mortgage, and ordering sale of the mortgage property; the decree describing the property substantially in the same language as the mortgage and not describing either of said tracts of land; and that said decree appointed A. T. Watts special master commissioner to execute same, and that Edward H. Pardee, defendant herein, became the purchaser under the
75 sale thus ordered and received a deed from said special master commissioner, and from said John H. Gaston receiver, and from George T. Atkins, a receiver of said Federal court; and that this purchase and deed is the only title defendants have to either of said tracts of land.

11th. That on April 2, 1895, C. C. Bumpass, trustee for J. E. Downes and associates, acquired title to both of said tracts of land by a valid judgment execution and sheriff sale and deed, against said original company.

12th. That subsequent thereto the surviving directors acting as trustees of said original company, for a valuable and legal consideration conveyed both of said tracts of land, as well as others, to said C. C. Bumpass, trustee, for J. E. Downes and associates; that subsequent thereto, and subsquent to the foreclosure and sale under the Central Trust Company mortgage to defendant Edward H. Pardee, said C. C. Bumpass, trustee for J. E. Downes and associates, obtained judgment in trespass to try title in the district court of Dallas county for said two tracts of land, and others, against all the surviving directors and trustees of the original company, and against John H. Gaston, receiver of the third company; that pending said suit said C. C. Bumpass, trustee for J. E. Downes and associates, by good and valid deed, conveyed said lands to plaintiffs, who are now the legal holders and owners of same.

13th. That defendants claim title under a certain execution sale to E. M. Powell and associates made October 7, 1886, and purporting to convey said two tracts of land, but that said sale is absolutely void, because when said sale was made the defendant company had been dissolved as a corporation, as above stated, and said execution sale was made on executions issued on judgments which had been rendered against said original company prior to its dissolution.

14th. Defendants also claim title under certain deeds executed by said E. M. Powell and associates, but said deeds convey no title for the following reasons:—

(*a.*) Because E. M. Powell and associates never had any title for the reasons above given.

(*b.*) Because it is shown by the record in this case that said
76 deed to E. M. Powell and associates had previously been cancelled by decree of the United States circuit court in suit No. 275, equity, George T. Atkins, receiver *vs.* C. T. Campbell *et al.*

(*c.*) Because the recovery by said Atkins, receiver, enures to the benefit of said John H. Gaston, receiver, under whom plaintiffs derive a valid and subsequent chain of title.

15th. Defendants also claim title under a certain deed from Atkins

receiver, to Edward H. Pardee, but in so far as said deed purports to convey any property not actually embraced in said Central Trust Company foreclosure and sale the same is void and of no effect; because it is not supported or authorized by any order of court, and because neither said Atkins, receiver, nor any party represented by him, owned or had any interest in either of said tracts of land, purporting to be conveyed by said deed.

For the reasons thus given and on the whole evidence in this case, and the findings of the jury it appears that plaintiffs own and are entitled to recover both said tracts of land *b* and *d* with exceptions above stated.

III.

Should the above motion be refused then plaintiffs come and move that the court set aside the verdict of the jury returned under the peremptory instructions of the court hereinafter stated, and to grant a new trial etc., because:

1st. The court erred in the admission and exclusion of evidence as shown by plaintiffs' bills of exceptions, to which reference is here made.

2nd. The court erred in refusing to give the jury the special instruction requested by plaintiffs, to which reference is hereby made.

3rd. The court erred in instructing the jury in the court's second special instruction to the effect "that no sales of the land have ever been made, nor has any part of the land been subdivided into lots; and that the railroad built its track across the land near its western boundary, and also built a side track on it and a Y near the center of it, and extending eastwardly across the land to
77 beyond the center of the land, and also small houses used as depots and car shed; and that it used in the operation of its road up to 1892, the main and side track and houses, and that this was the only land the road owned in Dallas where it terminated," because when said road was originally constructed it did not terminate in the city of Dallas and said land was not then inside the city limits; and because none of the facts recited in said instructions are substantial issues in this cause, but are at most mere evidential facts improper to be given in charge to the jury, and that the charge is an improper comment on the evidence and the weight of the evidence.

4th. The court erred in said 2nd special instruction as follows:—"Both as originally contemplated and as actually constructed, if the road had been properly constructed and operated it would have needed as much as 25 acres for actual facilities such as switches, shops, etc., and such would have been the usual and proper amount for such construction and operation;" because under the testimony it was for the jury to say whether or not the facts above recited were true, and the evidence did not warrant peremptory instructions; and because said facts if true are not substantial issue in this case, but are at most mere evidential facts and that said charge is an improper comment on the evidence.

5th. The court erred in the third paragraph in instructing the

jury as follows: "The main track of the road was built across the Mays tract near its eastern boundary, and also a spur track running out from the main track but near to it across the land so as to reach the sand. Sand has since been taken from the land and used in the construction, repairing and ballasting the road; the road has thus occupied about two acres of the tract;" because the facts above recited are not substantial issues in this cause, and are at most mere evidential facts, and said charge is an improper comment on the evidence.

6th. The court erred in instructing the jury that if the road was properly constructed and operated it would be necessary to use sand, in order to do so properly and successfully; because said instruction was an improper comment on the evidence and not upon substantial issues in the cause, and because it was for the
78 jury to say whether or not sand was necessary, and the testimony did not warrant a peremptory instruction in that respect.

IV.

The verdict of the jury and the judgment of the court is contrary to the law and the evidence. For the above and foregoing reasons plaintiffs pray that the judgment be reformed, as above prayed for, and otherwise that the verdict of the jury be set aside to the extent above prayed for and a new trial granted. And that plaintiffs have such other relief as they may in law be entitled to.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs.

Filed 25 day of July A. D. 1899.
H. W. JONES,
Clerk District Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Motion for New Trial.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147.

Now come the defendants in the above numbered and entitled cause, and move the court to set aside the verdict and judgment rendered in said cause against them for the following reasons, to wit:

First. The court erred in overruling defendants' demurrers to plaintiffs' first amended original petition.

Second. The court erred in refusing to give to the jury special charge No. 1, requested by defendants.

Third. The court erred in refusing to give to the jury special charge No. 2 requested by defendants.

Fourth. The court erred in refusing to give to the jury special charge No. 3, requested by defendants.

Fifth. The court erred in refusing to give to the jury special charge No. 4, requested by defendants.

Sixth. The court erred in refusing to give to the jury special charge No. 5, requested by defendants.

79 Seventh. The court erred in refusing to give to the jury special charge No. 6, requested by defendants.

Eighth. The court erred in refusing to give to the jury special charge No. 7, requested by defendants.

Ninth. The court erred in refusing to give to the jury special charge No. 8, requested by defendants.

Tenth. The court erred in refusing to give to the jury special charge No. 9, requested by defendants.

Eleventh. The court erred in refusing to give to the jury special charge No. 13, requested by defendants.

Twelfth. The court erred in refusing to give to the jury special charge No. 14, requested by defendants.

Thirteenth. The court erred in refusing to give to the jury special charge No. 15, requested by defendants.

Fourteenth. The court erred in refusing to give to the jury special charge No. 16, requested by defendants.

Fifteenth. The court erred in the first paragraph of its charge to the jury, reading as follows: "As to all of the land sued for, except the 25 acres bought from Hughes and Slaughter, and described as tract No. *b* in plaintiffs' petition and the 11–92 / 100-acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition, you will find for the plaintiff-, leaving out the right of way over all said land, and as to these tracts the form of your verdict will be as follows:

"We, the jury, find for plaintiffs all the land sued for save and except the right of way of the Texas Trunk railroad through the towns of Kaufman and Crandall, as shown on the maps of said towns recorded in vol. 50, page 163, and vol. 33, page 606, of the deed records of Kaufman county, Texas, and save and except a right of way 100 feet in width on each side of the center of the main track of the Texas Trunk railroad where it may cross any of said land, and also save and except the 25-acre tract bought from Hughes and Slaughter and described as tract No. *b* in plaintiffs' petition and the 11–92 / 100-acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition."

80 Sixteenth. The court erred in admitting over the objections of defendants, evidence of a judgment of the Dallas county district court in cause No. 4333 upon its docket, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, as shown by defendants' bill of exception- No. 1.

Seventeenth. The court erred in admitting, over the objections of defendants, evidence of the issuance of an execution to Dallas county upon the judgment of the district court of Dallas county in cause No. 4333 upon its docket, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, and of the levy of said execution and of

the sale thereunder by the sheriff to C. C. Bumpass as trustee, etc., and of the deed of said sheriff under such execution, levy and sale to said Bumpass as trustee, etc., as shown by defendants' bill of exceptions No. 2.

Eighteenth. The court erred in admitting, over the objections of defendants, evidence of the issuance of an execution to Houston county upon the judgment of the Dallas county district court in cause No. 4333 upon its docket, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, and of the levy of said execution and of the sale thereunder by the sheriff to C. C. Bumpass, as trustee, etc., and of the deed of the sheriff made in pursuance of such sale to said Bumpass as trustee, as shown by defendants' bill of exceptions No. 3.

Nineteenth. The court erred in admitting, over the objections of defendants, evidence of a judgment rendered April 7, 1898, in cause No. 14047 by the forty-fourth judicial district court of Dallas county in the cause entitled C. C. Bumpass *vs.* John F. Ely, *et al.* as shown by defendants' bill of exceptions, No. 4.

Twentieth. The court erred in admitting, over the objections of defendants, evidence of the deeds executed by James B. Simpson, D. A. Robinson, John F. Ely, and W. L. Cabell as directors and trustees of the Texas Trunk Railroad Company as originally incorporated to C. C. Bumpass, trustee, etc., as shown by defendants' bill of exceptions No. 5.

Twenty-first. The court erred in admitting, over the objections of defendants, evidence of the deeds from C. C. Bumpass, trustee, to
J. E. Downes and associates, and William G. Mowry, A. F.
81 Hardie and A. D. Aldridge as trustees, etc., as shown by defendants' bill of exceptions No. 6.

Twenty-second. The court erred in admitting, over defendants' objections, the evidence shown and referred to in defendants' bill of exceptions No. 9.

Wherefore defendants pray that said judgment be set aside in so far as it is against them and that they be granted a new trial.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

Filed July 25, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Order Overruling Plaintiffs' Motion to Reform Judgment, etc.

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 17147. Entered as of July 26th, 1899.

THURSDAY, *July 27th*, 1899.

Came on to be heard in the above entitled and numbered cause, the motion of plaintiffs filed herein to reform the judgment hereto-

fore rendered herein, and to set aside certain findings of the jury set forth in said motion, and in the alternative for a new trial, which motion being duly considered by the court, it is ordered, adjudged and decreed by the court that said motion be and they are hereby overruled, to which ruling of the court plaintiffs except and in open court give notice of appeal to the court of civil appeals in and for the fifth supreme judicial district of Texas.

JOHN M. AVERY,
Special Judge, Presiding.

Order Overruling Defendants' Motion for New Trial.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147. Entered as of July 26th, 1899.

THURSDAY, *July 27th*, 1899.

On this day came on to be heard the motion of defendants for a new trial, which motion being duly considered by the court, it is ordered, adjudged and decreed by the court that said motion
82 be and it is hereby overruled, to which ruling of the court defendants except and in open court give notice of appeal to the court of civil appeals in and for the fifth supreme judicial district of Texas.

JOHN M. AVERY,
Special Judge, Presiding.

Plaintiffs' Bills of Exceptions Nos. 1, 2, & 3.

Filed July 25th, 1899.

In District Court, Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147.

Be it remembered that on the trial of said cause the following proceedings were had:

1st. Plaintiffs offered to prove by the witnesses A. S. Jackson, county clerk of Dallas county, Texas, and Charles Archer, county surveyor of Dallas county, that no map or profile of the Texas Trunk railroad or of the land taken or obtained for the use thereof, as provided by R. S. (1879) art. 4248, was ever filed, either in the office of the county clerk or of the office of the county surveyor of Dallas county; and by witness W. L. Cabell, that he was vice-president and acting president of the Texas Trunk Railroad Company up to the International Trust Company foreclosure and sale, and that he was familiar with the actions of the company, and its officers and directors, that Dr. Graves was president, never lived in Texas and never acted as president, and that, so far as witness knows, no such map or profile was ever filed in the General Land Office.

Defendants objected to said testimony on the ground that it was immaterial and irrelevant and calculated to mislead the jury to the prejudice of defendants, which objections were sustained by the court, and said testimony excluded, to which rulings of the court plaintiffs then and there excepted.

2nd. Plaintiffs also offered to prove by the witness W. L. Cabell that about the time the company purchased the Mays tract of land the company also contracted for the purchase of another tract near the same, upon which there was a fine spring of water, where
83 the company intended to establish a summer garden and resort for the employés of the company who should reside on the Mays tract; and that both said tracts were negotiated for at the same time with the intention of using them together as indicated; but that for want of funds the company was unable at the time to pay for the spring tract, and that it was never actually acquired by the company for that reason.

Defendants objected to said testimony on the grounds that it was immaterial and irrelevant, and calculated to mislead the jury to the prejudice of defendants, which objections were sustained by the court, and said testimony excluded, to which rulings of the court plaintiffs then and there excepted.

3rd. Plaintiffs also offered to prove by the witness W. L. Cabell, and others, that the Dallas, Cleburne & Rio Grande Railroad Company was chartered July 31, 1879, this company being succeeded September 16, 1880, by the Chicago, Texas & Mexican Central Railroad Company, which built the road from Dallas to Cleburne, crossing the 25-acre Hughes and Slaughter tract, and intersecting with the Texas Trunk a short distance south of said tract, as shown on map read in evidence, said road now being owned by the Gulf, Colorado & Santa Fe Railroad Company; that said D. C. & R. G. Co., and C. T. & M. G. Co. had common stockholders, directors and promoters with the Texas Trunk Company, and that said companies acted together for the purpose of locating and establishing a town at the intersection of the two roads, this point being then in the country, outside the corporate or settled limits of the city of Dallas, and that the Hughes and Slaughter tract was purchased as a part and parcel of this town-cite scheme. Defendants objected to said testimony as immaterial and irrelevant, as calculated to mislead the jury to the prejudice of defendants, which objections were sustained by the court, and said testimony excluded, to which ruling of the court plaintiffs then and there excepted.

And now plaintiffs tender the foregoing bills of exceptions, and pray that they be allowed and made a part of the record, which is accordingly done.

84 Approved.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Plaintiffs' Bill of Exceptions No. 4.

Filed July 27th, 1899.

In District Court, Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Be it remembered that on the trial of said cause the following proceedings occurred:

When the court read his charge to the jury, counsel for plaintiffs, then and there, in open court, and before the jury retired to consider of their verdict, excepted to so much of said charge as directed *to* jury to find certain facts as embraced in paragraphs (2) and (3) said exceptions being then and there made and presented to the extent and on the grounds more fully set forth in subdivision III, paragraphs 3rd, 4th, 5th, and 6th, of plaintiffs' motion to reform judgment and set aside verdict, etc. filed herein July 25th, 1899, which motion is hereby referred to and made a part hereof for a particular statement of the grounds of said exceptions.

And now plaintiffs come and tender the above bill of exceptions and pray that it be allowed and made a part of the record, which is accordingly done.

Allowed.

J. M. AVERY,
Special Judge, Presiding.

Filed July 27th, 1899.

H. W. JONES,
Clerk Dist. Court, Dallas County, Texas.

Defendants' Bill of Exceptions No. 1.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 1.

Be it remembered, that upon the trial of the above numbered and entitled cause plaintiffs offered in evidence that part of
85 the agreement as to certain facts between the parties to this cause which showed that on March 15, 1887, in the suit of W. F. Thompson against The Texas Trunk Railroad Company, numbered 4333 upon its docket the district court of Dallas county, Texas, rendered judgment in favor of Charles Vidor and John Wolston as assignees of plaintiff, W. F. Thompson, and as surviv-

ing partners of the firm of Wolston, Wells & Vidor against the Texas Trunk Railroad Company for the sum of forty-two hundred and fifty dollars, besides costs of suit, and foreclosing an attachment lien. Counsel for defendants then and there objected to the introduction of said judgment and evidence upon the ground that it appeared from plaintiffs' own evidence already introduced and from the other facts already admitted by both parties that long prior to the rendition of said judgment by the Dallas county district court in said cause No. 4333 the entire road-bed, track, franchises and charter rights of the Texas Trunk Railroad Company, the defendant in said cause and judgment, had been sold under and in pursuance of decrees of the circuit court of the United States for the northern district of Texas, at Dallas, in cause No. 30 on its chancery docket foreclosing a mortgage executed upon said property and rights by said railroad company to the International Trust Company, as trustee, and that by reason of such sale all the powers, privileges and franchises granted said Texas Trunk Railroad Company by its charter or by virtue of the general laws of this State had passed to and vested in the purchasers at said sale, and that by reason thereof The Texas Trunk Railroad Company, defendant in said cause No. 4333, had become and was at and long before the rendition of said judgment in said last-mentioned cause dissolved, and the trustees of said sold-out company not having been made parties to the said cause and judgment the said judgment was therefore void and wholly immaterial and irrelevant. Reference is here made to the statement of facts in this cause for the evidence so objected to and for the other evidence and admissions above referred to and in explanation of this bill of exceptions. The court overruled said objections and admitted said evidence and judgment, to which action and ruling of the court counsel for defend-
86 ants then and there duly excepted and now tender this their bill of exceptions and ask that the same be approved and filed as a part of the record of this cause, and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Bill of Exceptions No. 2.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 2.

Be it remembered: that upon the trial of the above numbered and entitled cause, plaintiffs offered in evidence that part of the

agreement as to certain facts between the parties to this cause, which showed that on March 9th, 1895, an alias general execution was issued to Dallas county on or by virtue of the judgment of the district court of Dallas county entered as of March 15th, 1887, in cause number 4333 upon its docket, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, and showing that said execution was levied on the same day on so much of the lands described in plaintiffs' first amended original petition as are located in Dallas county, and that on April 2nd, 1895, said lands were sold under such execution and levy by the sheriff to C. C. Bumpass, trustee for J. E. Downes and associates and that the sheriff in pursuance of such execution and sale executed a deed for said lands to said Bumpass as such trustee. Counsel for defendants then and there objected to all said evidence upon the ground that it appeared from plaintiffs' own evidence already introduced and from the facts already admitted by both parties, that long prior to the rendition of said judgment by the Dallas county district court in cause No. 4333, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, and long before the issuance and levy of said execution and the sale under and in pursuance thereof and the execution and delivery of the deed made by the sheriff in pursuance of said sale, to said Bumpass, as trustee, the entire road-bed, track,

87 franchises and charter rights of The Texas Trunk Railroad Company, the defendant in said judgment had been sold under and in pursuance of decrees of the circuit court of the United States for the northern district of Texas at Dallas in cause No. 30, on its chancery docket, foreclosing a mortgage executed upon all said property and rights by said railroad company to the International Trust Company as trustee, and that by reason of such sale all the powers, privileges, and franchises granted said Texas Trunk Railroad Company by its charter, or by virtue of the general laws of this State, had passed to and vested in the purchasers at said sale, and that by reason thereof, The Texas Trunk Railroad Company, defendant in said cause No. 4333, had become and was at and long before the rendition of said judgment in said last-mentioned cause, dissolved, and the trustees of said sold-out company not having been made parties to said cause and judgment, said judgment, execution, levy and sale were therefore void and were wholly immaterial and irrelevant. Reference is here made to the statement of facts in this cause for the evidence so objected to and for the other evidence and admissions above referred to and in explanation of this bill of exceptions. The court overruled said objections and admitted said evidence, to which action and ruling of the court, counsel for defendants then and there duly excepted and now tender this, their bill of exception, and ask that the same be approved and filed as a part of the record in this cause, and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*
9—376

Defendants' Bill of Exceptions No. 3.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 3.

Be it remembered, that upon the trial of the above numbered and entitled cause plaintiffs offered in evidence that part of
88 the agreement as to certain facts between the parties to this cause which showed that on August 3rd, 1895, a pluries general execution was issued to Houston county on or by virtue of the judgment of the district court of Dallas county, Texas, entered as of March 15, 1897, in cause No. 4333, upon its docket entitled W. F. Thompson *vs.* The Texas Trunk Railroad Company and showing that said execution was levied on September 6th, 1895, on so much of the lands described in plaintiffs' first amended original petition as are located in Houston county, and that on October 1st, 1895, said lands were sold under such execution levied by the sheriff to C. C. Bumpass, trustee for J. E. Downes and associates, and that the sheriff in pursuance of such execution and sale, executed a deed for said land to said Bumpass as such trustee. Counsel for defendants then and there objected to all said evidence upon the ground that it appeared from plaintiffs' own evidence already introduced and from the facts already admitted by both par-ies that long prior to the rendition of said judgment by the Dallas county district court in said cause No. 4334 entitled W. F. Thompson *vs.* Texas Trunk Railroad Company before the issuance and levy of said execution and the sale under and in pursuance thereof, and the execution and delivery of the deed made by the sheriff in pursuance of said sale to said Bumpass, trustee, the entire road-bed, track, franchises and charter rights of The Texas Trunk Railroad Company, the defendant in said judgment, had been sold under and in pursuance of decrees of the circuit court of the United States for the northern district of Texas, at Dallas, in cause No. 30 on its chancery docket foreclosing a mortgage executed upon all said property and rights by said railroad company to the International Trust Company, as trustee, and that by reason of such sale all the powers, privileges and franchises granted to said Texas Trunk Railroad Company by its charter or by virtue of the general laws of this State had passed to and vested in the purchasers at such sale, and that by reason thereof The Tex. Trunk Railroad Company defendant in said cause No. 4333, had become and was at and long before the rendition of said judgment in said last-mentioned cause dissolved, and the trustees of said sold-
out company not having been made parties to said cause and
89 judgment, the said judgment, execution, levy and sale were void and were wholly immaterial and irrelevant. Reference

is here made to the statement of facts in this cause for further statement of the evidence so objected to and for the other evidence and admissions above referred to and in explanation of this bill of exceptions. The court overruled said objections and admitted said evidence, to which action and ruling of the court counsel for defendants then and there duly excepted and now tender this their bill of exceptions and ask that the same be approved and filed as a part of the record of this cause, and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Bill of Exceptions No. 4.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 4.

Be it remembered: that upon the trial of the above numbered and entitled cause plaintiffs offered in evidence that part of the agreement as to certain facts between the parties to this cause, which showed that on April 7, 1898, in cause No. 17047, upon the docket of the forty-fourth judicial district court in and for Dallas county, Texas, entitled C. C. Bumpass *vs.* John F. Ely, *et al.*, judgment was rendered decreeing that the Texas Trunk Railroad Company as originally incorporated be dissolved as a corporation; that John F. Ely, James B. Simpson, W. L. Cabell and D. A. Robinson were all surviving members of the last board of directors of said company and trustees of said dissolved corporation; that C. C. Bumpass as trustee for J. E. Downs and associates, have and recover of said Ely, Simpson, Cabell and Robinson as surviving directors and trustees of the Texas Trunk Railroad Company as originally incorporated, and of John H. Gaston as receiver of the Texas Trunk Railroad Company as subsequently organized, the title and possession of all the lands and premises involved in the present suit, and describing the same as they are described in plaintiffs' first amended original
90 petition herein. Counsel for defendants then and there objected to the introduction of said evidence and judgment upon the grounds: (*a*) that in so far as the same — against John F. Ely, James B. Simpson, W. L. Cabell and D. A. Robinson as surviving directors and trustees of the Texas Trunk Railroad Company as originally incorporated, etc. the said judgment is void, because it appeared from plaintiffs' own evidence already introduced, and from the facts already admitted by both parties, that at the date of the

sale and the confirmation of the sale of the entire road-bed, track franchises and charter rights of the Texas Trunk Railroad Company under and in pursuance of decrees of the circuit court of the United States for the northern district of Texas at Dallas, in cause No. 30 on its chancery docket, foreclosing a mortgage executed upon all of said property and rights by said railroad company to the International Trust Company as trustee, Josiah G. Graves, John F. Ely, George H. Ely, Daniel R. Sortwell, Malcolm Henderson, James B. Simpson, William L. Cabell, James T. Banston and D. A. Robinson were the directors and together constitute the board of directors of said sold-out Texas Trunk Railroad Company, while the said judgment *was* offered in evidence was against only four of the said directors and trustees; (*b*) that in so far as said judgment was against the Texas Trunk Railroad Company, it appeared from the face of said judgment, as well as from plaintiffs' own evidence already introduced, and from the facts already admitted by both parties, that said corporation had been dissolved and was then defunct; (*c*) that in so far as said judgment is against John H. Gaston as receiver of the Texas Trunk Railroad Company as organized September 14th, 1891, plaintiffs' own evidence already introduced and the facts already admitted by both parties, show that he had no right or title to said property, and it did not appear that the suit was brought against him by leave of the court appointing and controlling him and the said judgment as against him was irrelevant and immaterial, and (*d*) that said judgment was in all respects immaterial and calculated to mislead the jury to the prejudice of defendants. Reference is here made to the statement of facts in this cause for the judgment and evidence so objected to, and for the other evidence and admission above referred to, and in explanation of this bill of exceptions.

The court overruled said objections and admitted said evidence, to which action and ruling of the court counsel for defendants
91 then and there duly excepted and now tender this their bill of exceptions, and ask that the same be approved and filed and made a part of the record in this cause and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.

H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Bill of Exceptions No. 5.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 5.

Be it remembered: that upon the trial of the above numbered and entitled cause, plaintiff offered in evidence that part of the agreement as to certain facts between the parties to this cause, which showed that on December 28, 1897, James B. Simpson, D. A. Robinson John F. Ely and W. L. Cabell, as directors and trustees of the Texas Trunk Railroad Company as incorporated on the 6th day of November 1879, executed to C. C. Bumpass, trustee, for J. E. Downes and associates, for a recited consideration "of the sum of one dollar and other valuable considerations" a deed without warranty, conveying to said Bumpass as such trustee the lands located in Dallas county described in plaintiffs' first amended original petition in this cause, and "also all other lands in Dallas county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company," and showing that also on the same day deeds were executed in the same form by same grantors to the same grantee conveying the Kaufman and Houston county lands described in plaintiffs' first amended original petition in this cause, and also conveying generally all other lands in Houston and Kaufman counties, Texas, deed- to or formerly owned by said Texas Trunk Railroad Company, counsel for defendants then and there objected to all said deeds and evidence upon the ground that it appeared from plaintiffs' own evidence already introduced and from the facts already admitted by both parties, that at the date of the sale and the confirmation of the sale of the entire road-bed, track, franchises and charter rights
92 of the Texas Trunk Railroad Company under and in pursuance of decrees of the circuit court of the United States for the northern district at Dallas in cause No. 30 on its chancery docket, foreclosing a mortgage executed upon all of the said property by said railroad company to the International Trust Company as trustee, Josiah G. Graves, John F. Ely, George H. Ely, Daniel R. Sortwell, Malcolm Henderson, James B. Simpson, William L. Cabell, James T. Banston and D. A. Robertson were the directors and together constituted the board of directors of said sold-out Texas Trunk Railroad Company, while the said deeds from their own terms showed that they were made and executed by only *of* four of said directors as trustees, and that said deeds, therefore passed no title, were void and wholly immaterial. Reference is here made to the statement of facts in this cause for the evidence and deeds so objected to and for the other evidence and admissions above referred to, and in explanation of this bill of exceptions. The court over-

ruled said objections and admitted said evidence, to which action and ruling of the court counsel for the defendants then and there excepted, and now tender this, their bill of exceptions, and ask that the same be approved and filed as a part of the record in this cause, and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Bill of Exceptions No. 6.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 6.

Be it remembered: that upon the trial of the above numbered and entitled cause plaintiffs offered in evidence that part of the agreement as to certain facts between the parties to this cause, which showed that on January 16, 1896, C. C. Bumpass, trustee for J. E. Downes and associates, executed to William G. Mowry,
93 A. F. Hardy and A. D. Aldridge, trustees for J. E. Downes and associates, a deed without warranty conveying the lands located in Dallas county, as described in plaintiffs' first amended original petition in this cause, and "also all other lands in Dallas county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company," and showing also that on February 4, 1898 by deeds of that date in the same general form as the deed last mentioned C. C. Bumpass, trustee for J. E. Downes and associates, conveyed to William G. Mowry, A. F. Hardy, and A. D. Aldridge, trustees for J. E. Downes and associates, the Kaufman and Houston county lands as described in plaintiffs' first amended original petition in this suit, and also conveying all other lands in Kaufman and Houston counties deeded to or formerly owned by the Texas Trunk Railroad Company. Counsel for defendants then and there objected to all such evidence showing that C. C. Bumpass, trustee for J. E. Downes and associates, had any title or was connected with the title to the lands, which by said deeds he purported to convey, and that said deeds and evidence were therefore immaterial and calculated to mislead the jury to the prejudice of the defendants. Reference is here made to the statement of facts in this cause for the evidence and the deeds so objected to, and in explanation of this bill of exceptions. The court overruled said objections and admitted said evidence, to which action and ruling of the court counsel for defendants then and there duly excepted and now tender

this their bill of exceptions, and pray that the same be approved and filed as a part of the record in this cause, and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Bill of Exceptions No 7.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL. }
vs. } No. 27147.
E. H. PARKER ET AL. }

94 Defendants' bill of exceptions No. 7.

Be it remembered, that upon the trial of the above numbered and entitled cause, in answer to questions propounded by plaintiffs' counsel, over the objections of defendants' counsel upon the grounds hereinafter stated, plaintiffs' witness W. M. Johnson was permitted to and did testify substantially to the effect that the Pegues tract of land located in East Dallas and conveyed by W. E. Hughes and wife and C. C. Slaughter and wife to the Texas Trunk Railroad Company by deed dated March 13, 1880, was abandoned and not used as terminals for the Texas Trunk railroad soon after the appointment of Charles Billingham as receiver of said railroad, etc., in September, 1891, and was also permitted to testify and did testify as to the railroad structures and improvements which had been removed from said tract of land when he surveyed and examined the same in 1895. Counsel for defendants then and there, as the questions eliciting said testimony were asked and as said evidence was given, objected to such questions and evidence and to all evidence showing any impairment of the use or any abandonment of the use of said land for railroad purposes or in connection with the operation and maintenance of said railroad by the railroad company or any receiver of it, subsequent to the execution of the bonds and mortgage to the Central Trust Company of New York, that is to say August 30, 1888, upon the ground that the rights of the holders of said bonds and those claiming under said mortgage and bonds through the foreclosure of said mortgage and the sale of the mortgaged premises attached upon the execution and delivery of said mortgage and bonds and the registration of said mortgage and could not be affected or impaired by any subsequent action of the mortgagor or of the receiver of the mortgaged property, and that such evidence was immaterial and calculated to mislead the jury to the prejudice of the defendants. Reference is here made to the statement of facts in this cause for the evidence so objected to and in explanation of this bill of exceptions. The

court overruled such objections and held that all evidence offered respecting the use or discontinuance of the use of abandonment of said property for railroad purposes, or in connection with
95 the operation of said railroad up to March 16, 1896, the date of the order for completing the bed. Counsel for defendant then asked that the objections above stated should be understood as applying to all such evidence offered, and this was assented to by the court and by counsel for the plaintiffs. Counsel for defendants further stated that in cross-examining plaintiffs' witnesses and in offering evidence for defendants concerning the use or discontinuance of the use of the said property for railroad purposes, or in connection with the operation and maintenance of said railroad in accordance with the ruling of the court just mentioned defendant reserved and will insist upon all the objections above stated as to all such evidence. And counsel for defendants then and there and in due time duly excepted to the action and ruling of the court in overruling the objections above stated and in admitting the evidence above mentioned, and now tender this their bill of exceptions and ask that the same be approved and filed as a part of the record in this cause and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Defendants' Bill of Exceptions No. 8.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 8.

Be it remembered, that upon the trial of the above numbered and entitled cause, defendants offered in evidence that part of the lists of the property of the Texas Trunk Railroad Company rendered to the tax assessor of Dallas county, Texas, by the Texas Trunk Railroad Company for the years 1889, 1890 and 1891, and by Charles Dillingham, as receiver for the year 1892, and by George T. Atkins, as receiver for the years 1893, 1894, 1895 and 1896, and by William Whyte, as receiver for the years 1897 and 1898, which showed
96 that all the 25-acre tract of land situated in East Dallas, referred to as the Hughes and Slaughter tract (being the tract described in subdivision (*b*) of plaintiffs' petition) was duly rendered by said railroad company and by said receivers for taxation for said years, and that they paid the taxes assessed thereon. In offering said documents defendants limited the offer to that portion showing the rendition of said tract. The lists offered were printed lists in

the form prescribed by the comptroller of public accounts, and there was also printed on them a copy of the statute appearing now as art. 5082 of the Revised Statutes of 1895. Plaintiffs' counsel then offered the entire list, including the printed directions thereon, including also the printed copy of the article of the statute above referred to. Counsel for defendants then and there objected to the reading of the said printed directions and to the reading of the copy of said article of the statutes to the jury upon the ground that the same was irrelevant and calculated to mislead the jury to the prejudice of defendants, and upon the further grounds that the holders of the bonds secured by the mortgage through the foreclosure of which defendants claimed were not bound by any representations of any agent of the mortgagor company or any of its receivers, or by any failure upon their part to observes the modes prescribed by law for rendering and assessing property for taxation. Reference is here made to the statement of facts in this cause for the evidence so introduced and objected to and in explanation of this bill of exceptions. The court overruled said objections and admitted said evidence and permitted plaintiffs' counsel to read the said printed directions and the said copy of the statute referred to to the jury, to which action and ruling of the court defendants then and there duly excepted and now tender this, their bill of exceptions, and ask that the same be approved and filed as a part of the record in this cause, and it is so ordered.

The foregoing bill of exceptions is allowed with the following qualifications:

The records introduced in evidence were the original assessments which were produced in court.

97 Counsel for defendants offered these papers in evidence with the following statement: "I now introduce in evidence the tax assessor's records showing that the Texas Trunk Railroad Company and its receivers, Dillingham, Atkins and Whyte have for said Texas Trunk Railroad Company rendered and paid taxes against this Hughes and Slaughter 25-acre tract and the Mays 11-92/100-acre tract since 1889. I offer that part of it." Said records were then admitted in evidence under the above statement without objection, but the records were not in fact read to the jury by defendants' counsel.

Plaintiffs' counsel then proposed to read said records in full to the jury. Defendants' counsel objected to the reading of the statutes and of all other parts except such as referred to the payment of taxes, said objection being made on the grounds above stated. These objections were overruled, defendants excepted, and counsel for plaintiffs was permitted to read records in full.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day of July A. D. 1899.
H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*
10—376

Defendants' Bill of Exceptions No. 9.

Filed July 25th, 1899.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Defendants' bill of exceptions No. 9.

Be it remembered that on the trial of said cause plaintiffs offered in evidence that part of the agreement of the parties shown in statement of facts to the effect that Judge Pardee was beyond territorial limits of the northern district of Texas, and of the 5th circuit when he made the order appointing Charles Dillingham receiver.

Defendants objected to the introduction of said evidence on the ground that it was immaterial and irrelevant and calculated to mislead the jury, to the prejudice of defendants, which objections were overruled by the court and said evidence admitted, to which ruling of the court defendants then and there excepted, and now
98 tender this their bill of exceptions and ask that the same be approved and filed as a part of the record of this cause, and it is so ordered.

J. M. AVERY,
Special Judge, Presiding.

Filed 25 day July A. D. 1899.

H. W. JONES,
Clerk Dist. Court, Dallas County, Texas,
By CALHOUN KNOX, *Deputy.*

Statement of Facts.

Filed July 27th, 1899.

In District Court, Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Statement of facts.

Be it remembered that the following is a full, true and correct statement of the facts proved and evidence introduced on the trial of said cause:

Plaintiffs' Evidence.

Order remanding cause from U. S. court.

Plaintiffs first introduced in evidence a certified copy of an order of the United States circuit court, for the northern district of Texas, at Dallas, made on February 27th, 1899, remanding this cause from said United States court to this court, and directing that the clerk of said United States court issue a certified copy of said order to be filed in said State court, advising said State court of the said order. Said certified copy was filed among the papers of this cause on March 23, 1899.

Agreement of Parties.

Plaintiffs next read in evidence a written agreement of the parties, covering most of the matters of record, deeds etc., relied upon by the parties, and numerous matters *in pais*. This agreement provided that it should be read in evidence on the trial, and that "either party may introduce any additional evidence, competent and relevant to the issues, and not inconsistent with this agreement." Said agreement also provided as follows:—"Except where otherwise expressly stated, this agreement shall not be construed as any admission of the validity or legal effect of any of the proceedings herein recited or referred to, or of their materiality or
99 relevancy, to the issues in this cause; but the court in rendering judgment or charging the jury shall determine all questions as to the validity, materiality, relevancy and legal effect of all said proceedings, taking into consideration all the material facts set forth in this agreement, in connection with all other evidence that may be admitted on the trial.

And it is further agreed that any party may offer as evidence on the trial the original or a certified copy of any judgment, decree, deed, or other documentary evidence recited or referred to in this agreement, after five days' notice previous to the trial to and service on the other party; and such original or copy when so offered shall control as evidence of the contents of such instrument—anything in this agreement to the contrary notwithstanding."

The following is a condensed statement of the material facts stated in said agreement, stating only such documents or extracts therefrom in full as were the subjects of controversy, and concerning the legal effect of which the parties were unable to agree.

Common Source of Title.

I.

All the lands in controversy were deeded to the Texas Trunk Railroad Company by the respective grantors and by deeds bearing the respective dates set forth in plaintiffs' first amended original

petition, and said deeds were duly recorded as stated in said petition. Said deeds are the agreed common source of title to the respective tracts therein described. They were all properly executed and acknowledged. The recited consideration in the deed to tract (*b*) was $2500 paid, tract (*d*) $384.60 paid, and in all the other deeds the recited consideration was $1 and the benefit to be derived by the respective grantors from the construction of the Texas Trunk railroad.

II.

The Texas Trunk Railroad Company was incorporated November 6, 1879, upon which date its articles of incorporation were filed in the office of the secretary of state, and of which the following is a copy:

Texas Trunk R. R. Co. Charter.

100 Articles of association for the incorporation of the Texas Trunk Railroad Company.

Be it known that we, Malcolm Henderson, Josiah G. Graves, M. B. Stone, John F. Ely, Elisha D. Ely, Hays Longee, William K. Snow, James W. Hadlock, H. M. Wall, James T. Vanston, George H. Ely, Daniel R. Sortwell, O. Kimball, Edward Kavanaugh, Jas. A. Cunningham, James B. Simpson, W. L. Cabell and our associates, subscribers to the capital stock of the Texas Trunk Railroad Company, being desirous of acquiring and enjoying the powers, immunities, rights and privileges of a corporation, or body politic, in law, for the purpose of constructing, maintaining and operating a railroad and a line of telegraph in the State of Texas, under and by virtue of the provisions of the general law of the State of Texas, title LXXXIV, chapters 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13, respecting railroads, and all amendments thereof; do hereby associate ourselves under the name and for the objects and purposes specified in the following articles of incorporation signed in duplicate and this day adopted by us:

Article first. The corporation name of this company shall be the Texas Trunk Railroad Company.

Article second. The places from and to which it is intended to construct the proposed railroad and line of telegraph are as follows, to wit: Commencing at the city of Dallas, in the county of Dallas, State of Texas, thence extending southeastwardly to the Gulf coast at or near Sabine pass, in the county of Jefferson. Also a branch road from some point on the main line, either in the county of Angelina, or in the county of Tyler, to and through the counties of Jasper and Newton to the boundary line between the State of Texas and Louisiana, in all a distance of about three hundred and fifty miles. The counties through which it is proposed to construct said railroad and telegraph line are: Dallas, Kaufman, Henderson, Anderson, Cherokee, Angelina (or in place of the latter two counties,

the counties of Houston, Trinity and Polk) Tyler, Hardin, Jefferson, Jasper and Newton.

Article third. The place at which shall be established and maintained the principal business office of said corporation, shall be the city of Dallas, State of Texas.

101 Article fourth. This corporation shall commence its corporate existence and date from the filing of this charter in the office of the secretary of the State of Texas, and shall continue for the period of fifty years, with the privilege of renewal from time to time as provided by the laws of the State of Texas.

Article fifth. The amount of the capital stock of this corporation shall be five millions of dollars, with the right to increase or diminish the same under and in accordance with the laws of the State of Texas.

Article sixth. The number of shares in the capital stock of this corporation shall be fifty thousand (50,000) of the par value of one hundred dollars each.

Article seventh. The names and places of residence of the several persons forming the association for the incorporation of this company are as stated in the preamble of these articles, viz:—

Malcolm Henderson, Dallas Texas; Josiah G. Graves, North Scituate, Mass.; M. B. Stone, North Scituate, Mass.; John F. Ely, Canton Ohio; Hays Longee, Chelsea, Mass.; William K. Snow, Boston, Mass.; James H. Hadlock, Boston, Mass.; H. M. Wall, Boston, Mass.; James T. Vanston, Kaufman county, Texas; George H. Ely, Cleveland, Ohio; Daniel R. Sortwell, Cambridge, Mass.; O. Kimball, Peabody, Mass.; Edward Kavanaugh, Peabody, Mass.; James A. Cunningham, Boston, Mass.; James B. Simpson, Dallas, Texas; W. L. Cabell, Dallas, Texas.

Article eighth. The government of this corporation and the management of its affairs, shall be vested in a board of directors, composed of not less than seven nor more than nine persons, and a president and a vice-president, (who shall both be members of said board of directors) a treasurer, and secretary, and such other officers or agents as may be determined upon by the board of directors.

Article ninth. The first board of directors of the corporation shall consist of the following-named persons, viz: Josiah G. Graves, Jno. F. Ely, George H. Ely, Daniel R. Sortwell, Malcolm Henderson, James B. Simpson, William L. Cabell, James T. Vanston, D. A. Robinson, The president of the corporation shall be Josiah G.

102 Graves, the vice-president shall be William L. Cabell, the treasurer shall be Malcolm Henderson, the secretary shall be D. A. Robinson, and the said directors and officers shall continue in office until others are elected or appointed in their places respectively.

In witness whereof and of the adoption by us of the foregoing as the articles of incorporation for said company, we hereunto sub-

scribe our names. Done in duplicate this second day of October, A. D. 1879.

(Signed) JOSIAH G. GRAVES,
Of North Scituate, Mass.
M. B. STONE,
Of North Scituate, Mass.
JNO. F. ELY, *Of Canton, Ohio.*
MALCOLM HENDERSON,
Dallas, Texas.
WILLIAM K. SNOW,
Boston, Mass.
H. M. WALL, *Boston, Mass.*
JAMES W. HADLOCK,
Boston, Mass.
JAMES T. VANSTON,
Kaufman County, Texas.
GEORGE H. ELY,
Cleveland, Ohio.
DANIEL R. SORTWELL,
Cambridge, Mass.
O. KIMBALL, *Peabody, Mass.*
EDWARD KAVANAUGH,
Peabody, Mass.
JAMES A. CUNNINGHAM,
Boston, Mass.
JAMES B. SIMPSON,
Dallas, Texas.
W. L. CABELL, *Dallas, Texas.*
D. A. ROBINSON, *Dallas, Texas.*

STATE OF TEXAS, }
County of Dallas. }

Before me, the undersigned, notary public, for the county of Dallas, State of Texas, personally appeared James B. Simpson, D. A. Robinson, M. Henderson and W. L. Cabell, directors named in the article- of incorporation of the Texas Trunk Railroad Company, who being severally duly sworn, depose and say that they have opened books of subscription to the capital stock of said company, and that 4,300 shares of stock have been subscribed, and amounting to more than one thousand dollars per mile for three hundred and fifty miles, the proposed length of the road, and that five per cent. of the amount of stock subscribed to the Texas Trunk Railroad Company, has been paid in cash to the directors named in the foregoing articles of incorporation.

Witness my hand and official seal at the city of Dallas this the 28th day of October, A. D. 1879.

(Signed) C. B. WELLBORN,
[L. S.] *Notary Public, Dallas Co., Texas.*

103 ATTORNEY GENERAL'S OFFICE,
AUSTIN, TEXAS, *October* 31*st*, 1879.

This to certify that the foregoing article of incorporation of the "Texas Trunk Railroad Company" was submitted to me on this day, the 31st day of October, A. D. 1879, and after examining the same I find it to be in accordance with the provisions of the general laws of the State of Texas, as contained in the Revised Statutes of said State, title LXXXIV, chapter one, providing for the incorporation of associations that may be organized for the purpose of constructing railroads, maintaining and operating the same; for prescribing and defining the duties and limiting the powers of such corporations when so organized and not in conflict with the laws of the United States or of this State.

(Signed) GEO. McCORMICK,
Attorney General.

Endorsed: Charter of the "Texas Trunk Railroad Company."

Filed in the department of State and recorded on page- 158, 159, 160 and 161 of Record of Railroad Charters November 6, 1879.

(Signed) JOHN D. TEMPLETON,
Sec'y of State.

Texas Trunk R. R. Co. By-laws.

On December 11, 1879, the directors called a regular annual stockholders' meeting for January 20, 1880, for the purpose, among other things, of enacting and adopting by-laws for the company. On January 21, 1880, by-laws were adopted. They are quite voluminous. By article IV, sec. I, it was provided that "no officer or agent of the company shall have the right to execute or sign any contract or other instrument in writing that shall be binding on the company, except in pursuance of some order or resolution passed by the board of directors." Article VIII, sec. I, provided for an executive committee of three and defined its powers.

These by-laws were certified for filing with the secretary of state on —— —, and were filed on, —— —, 1879.

All the above proceedings were regular in form and in accordance with law.

104 *International Trust Co. Mortgage.*

III.

On March 22, 1880, the Texas Trunk Railroad Company duly executed to the International Trust Company, as trustee, a mortgage on its railroad etc., describing the mortgaged property as follows:

("All and singular the railroad of the party of the first part, as the same now is or may hereafter be constructed from its terminus, in or near the city of Dallas and State of Texas, southeastwardly through the counties of Dallas, Kaufman, Henderson, Anderson,

Cherokee, Angelina, Tyler, Hardin, and Jefferson to the Gulf coast, at or near Sabine pass, together with a branch from some point on the main line, to, and through the counties of Jasper and Newton, to the boundary line between the States of Texas and Louisiana, in all a distance of about three hundred and fifty miles, including the right of way, road-bed, superstructure, iron, ties, splices, chairs, bolts, nuts, spikes, all lands and depot grounds, station-houses and depots, viaducts, bridges, timber and materials and property purchased and to be purchased for the construction and equipment of said road; all the locomotives and cars, and machinery, and all kinds of rolling stock, whether now owned or hereafter to be purchased by the said party of the first part, together with all machine shops, tools, implements and personal property used therein, or upon, or along the line of said railroad, or at its stations, or any of them including all appurtenances and appendages of said railroad, and the property of said company now acquired or which may be acquired, in the State of Texas, used for and pertaining to the operation of said railroad; also all the right, title and interest which the said party of the first part now has or may hereafter acquire in and to a certain portion of the lands granted to said party of the first part, by the laws of the State of Texas in such cases made and provided; that is to say, fourteen sections out of sixteen sections per mile for each and every mile of road constructed and to be constructed, amounting in the aggregate to four thousand and nine hundred sections of six hundred and forty acres each, or three million
105 one hundred and thirty-six thousand (3,136,000) acres of land, which said lands are to be selected in the manner hereinafter provided.")

This mortgage was executed to secure 4900 thirty-year seven per cent. bonds of $1000 each, which were to be issued from time to time as directed in the mortgage. The instrument contained numerous other provisions usual in railroad mortgages, including provisions authorizing the trustee to represent the bondholders and to foreclose the mortgage in his own name in case of default, and authorizing foreclosure for default in payment of semi-annual interest. The mortgage was duly recorded in Dallas county, May 31st, 1880, in Kaufman county, June 2, 1880, and in Henderson Anderson, Cherokee, Angelina, Jasper, Tyler, Hardin and Jefferson counties on sundry dates in June 1880.

Original R. R. Construction.

IV.

During 1880 and 1881, the road was completed from Dallas to Kaufman, about 36 miles, and about 476 bonds were issued and disposed of, 152 absolutely and 324 as collateral security. The company also incurred a large floating indebtedness some of which was a statutory labor lien on the road. Some progress had also been made in grading the road to Cedar, about 15 miles beyond Kaufman.

W. K. Snow Receivership.

V.

On December 5, 1881, W. K. Snow, *et al.*, claiming debts secured by statutory liens against the railroad company, and alleging the company's insolvency, brought suit in the district court of Kaufman county to enforce their liens and for the appointment of a receiver. On the same day Thomas M. Simpson was appointed receiver of all the company's property and he immediately qualified and entered on the discharge of his duties. The style of this suit is No. 1824, W. K. Snow *et al. vs.* The Texas Trunk Railroad Company, and will be hereinafter referred to as the Snow suit.

On June 5, 1882, Charles Stepath *et al.* bondholders, asked leave to intervene in the Snow suit, which was refused. On June 6, 1882, they filed an answer and petition in intervention in said suit,
106 and petition and bond to remove the suit to the United States circuit court at Dallas. On June 7, 1882, the motion for removal was overruled. On June 8, 1882, Simpson resigned as receiver, and H. T. Nash was appointed to succeed him. On June 27, 1882, Nash qualified and entered on the discharge of his duties.

On the 26th of September, 1882, said Charles Stepath *et al.* filed in the United States circuit court at Dallas a copy of the record in the Snow suit and prayed for a writ of certiorari, etc. A motion to remand said cause was overruled. On June 19, 1883, the accounts of H. T. Nash were settled and he was finally discharged as receiver by the United States circuit court, C. A. Keating having in the meantime been appointed receiver, as hereinafter shown. It also remained on the docket of the Kaufman district court until November term, 1884, when it was stricken from the docket. It is admitted that the suit was properly removed to the United States court. It remained on the docket of the United States court until June 23, 1891, when it was dismissed at plaintiffs' cost, for want of prosecution.

CHAS. STEPATH ET AL.
vs.
T. T. R. R. Co.

VI.

On September 26, 1882, said Charles Stepath *et al.* being the intervenors in the Snow suit, as well as other bondholders, sue[illegible] on their own behalf and on behalf of all other bondholders filed their original bill in the United States circuit court at Dallas against the railroad company for a foreclosure of the mortgage, the investigation and payment of labor claims, and the appointment of a receiver. The style of this suit, as originally instituted, was No. 30 Ch., Charles Stepath *et al. vs.* Texas Trunk Railroad Company. It described the property as in the mortgage (except that it mentioned some chattels with more particularity). It recited all the proceedings in the Snow suit. The prayer of the bill was:

(1.) For the appointment of a receiver.
(2.) Investigation of labor liens, etc.
(3.) Account of bonds issued, etc.; that the mortgage be foreclosed and that the "said railroad and its franchises and other
107 property embraced in said mortgage" shall be sold and the proceeds applied to the payment of. *first*, costs, etc. *second*, labor liens; *third*, bonds etc.,
(4.) That the purchaser may pay for "said railroad and other mortgaged property" in a particular manner, as provided in the mortgage, not necessary to detail here.

The bill concluded with a prayer for general relief, requiring answer, etc, and prayed for subpœna.

On November 22, 1882, the railroad company filed its answer, which in the main consists in formal admission of the allegations in the bill.

On December 22, 1882, the International Trust Company filed its petition in intervention, praying to be made complainant.

INTERNATIONAL TRUST CO. }
vs.
T. T. R. R. CO. }

On January 9, 1883, leave to intervene and to become a party complainant, having been granted, the trustee filed its amended and supplemental bill, which does not in substance, differ materially from the original bill, the prayer being substantially the same. After this the suit proceeded under the style No. 30 Ch. International Trust Company *vs.* The Texas Trunk Railroad Company.

On January 25, 1883, the railroad company answered the amended bill by Oliver K. Kennedy, solicitor, substantially admitting all that was charged. The same day the trust company and also the original complainants, filed formal replications. The same day C. A. Keating was appointed receiver and Nash was ordered to surrender the property to him.

International Trust Company Foreclosure Decree.

On January 31, 1883, a decree of foreclosure and sale for $328,814.75 was rendered. In this decree the property ordered sold is described as follows:

All and singular the railroad as the same then was or might be thereafter constructed from its terminus in or near the city of Dallas, and State of Texas, southeastwardly through the counties of Dallas, Kaufman, Henderson, Anderson, Cherokee, Angelina, Tyler, Hardin and Jefferson, to the Gulf coast at or near Sabine pass, together with a line between the States of Texas and Louisiana, in all a distance of about three hundred and fifty miles, includ-
108 ing the right of way, road-bed, superstructure, iron, ties, splices, chains, bolts, nuts, spikes, all lands and depots grounds, station-houses and depots, viaducts, bridges, lumber and materials and property purchased and to be purchased for the construction

and equipment of said road: all rolling stock, whether then owned or thereafter to be purchased by the said Texas Trunk Railroad Company, and all the franchises and rights of the said railroad company, together with all machine shops, tools, implements, and including all appendages and appurtenances of said railroad, and the property of said railroad company then acquired or which might thereafter be acquired in the State of Texas used for and pertaining to the operation of said railroad; also all the right, title and interest which the said railroad company then had or might thereafter acquire in and to a certain portion of the lands granted to said Texas Trunk Railroad Company by the State of Texas; that is to say, fourteen out of every sixteen sections of land granted, etc.

The decree appoints Abner S. Lathrop special commissioner to make the sale, prescribes the terms of sale, directs an amount of bonds and labor liens, and allowance to trustee, awards $15,000 solicitor's fee to trustee, and directs the master commissioner to report at the next term of court.

Sale to M. F. Dickson et al.

On May 1, 1883, A. S. Lathrop, special commissioner, sold the property embraced in the decree to M. Fayette Dickson, Sr., and D. R. Sortwell of Boston, Charles Stepath and John C. Chew of New York, and Samuel J. Adams of Dallas, purchasing trustees, subject to confirmation by the court. A deed from the special master to the purchasers, describing the property as in the decree of foreclosure, was executed May 1, 1883, acknowledged May 2, 1883, and recorded August 29, 1883, Book 62, p. 245, Dallas county deed records.

The master having reported the sale to the court, on June 6, 1883, the court rendered a decree confirming the sale in the following terms:

Decree of Confirmation.

This day came on to be heard the motion of complainant in this cause to confirm the report presented to the court and filed on the first day of this term, of the special master, A. S. Lathrop, of the sale of the Texas Trunk railroad and the rolling stock and
109 the land grant and of the charter rights, privileges and franchises and other property of the Texas Trunk Railroad Company, and it being shown to the satisfaction of the court that the Texas Trunk Railroad Company has had due notice of this motion, and thereupon the said report of sale being read to the court, and no objection being made to the same, it is ordered, adjudged and decreed that the sale be, and is hereby in all things confirmed, subject expressly to the conditions of this decree hereinafter set forth. It being shown to the court that there are labor liens and other charges against the said railroad company, the amount of which has not been reported by the special master, or yet ascertained by the court, now this decree is made subject to any demands against said Texas Trunk Railroad Company for labor liens, bondholder or other

demands which by the court shall be found and declared a lien or charge thereon, and this decree of ratification of said sale is made subject thereto, and said railroad and other property is held by the court bound for the same. And upon such amounts being found and decreed as due and owing from said Texas Trunk Railroad Company, thereupon the clerk of this court is ordered to give notice of such demand and charges so found and decreed to the purchasing trustees at said sale or any of them in person or by letter by mail addressed to them at their respective post-offices, and if such purchasing trustees and associates fail for twenty days after such notices are mailed or given, to pay off and discharge such demands, then the clerk of this court shall issue an order to the marshal of this court to seize and after advertising the same for six days to proceed to sell said railroad and other property, or so much thereof as will satisfy and pay off such demands and charges and all costs and make due return thereof. It is further ordered and decreed that if said purchasers shall pay off and discharge all such labor liens and other charges which may be decreed by the court upon the final coming in of the master's report, and shall pay in funds or money, in accordance with the original decree in this cause any amount of the balance of the purchase-money which may be due after deducting the amount found due for labor liens or other charges as hereafter decreed by this court, then the said sale
110 is made and declared to be absolute and the title to said property vested in the purchasers unconditionally.

Organization of Second Company.

On June 15, 1883, the purchasers and their associates met and reorganized the company, with a paid-up capital of $5,000,000 in shares of $100 each, representing the purchased property, provided for distribution of these shares, appointed M. F. Dickenson, Jeremiah W. White, D. R. Sortwell, Charles Stepath, S. J. Adams, J. E. Schneider, R. W. Thompkins, Alex. Sanger, and L. A. Pitts, directors, S. J. Adams, president, J. W. White vice-president, A. H. Stuart, secretary and A. Davis, treasurer, adopted by-laws and transacted such other business as was necessary to perfect the reorganization.

On June 19, 1883, the following order was made by the United States court:

Order Delivering Property to Second Company.

"In this cause came M. F. Dickenson, S. J. Adams and others, their associates, purchasers of the Texas Trunk railroad, rolling stock, charter and other property of the Texas Trunk Railroad Company, at sale by Special Master A. S. Lathrop, on first Tuesday in May, 1883, and present to the court their petition in writing stating that said purchasers have organized a new company under the charter so purchased by them, styled 'Texas Trunk Railroad Company' and praying that the receiver of said railroad, rolling stock, etc., C. A. Keuting, deliver possession of and turn over said railroad and

other property now held by him as receiver of this court to said Texas Trunk Railroad Company as organized as aforesaid. It is thereupon ordered by the court that said receiver, C. A. Keating, deliver possession of and turn over to S. L. Adams, president of said Texas Trunk Railroad Company, or such other person as may be appointed by the board of directors of said railroad company to receive and receipt for the same, the said railroad, rolling stock and all other property of said railroad company in his possession as such receiver on or before the first Monday in July 1885, taking proper receipts for the same, and that he make due report thereof to this court."

The directions of this decree were complied with.

The reorganization mentioned in the foregoing decree will, for purposes of distinction, be called "Texas Railroad Company No. 2, the previous and first organization being called No. 1.

111

Allowance to International Trust Co.

The decree of foreclosure above mentioned, of date January 21, 1885, provided "that the special master shall ascertain and report what allowance shall be made to the trustee, the International Trust Company, for its services as trustee of the Texas Trunk Railroad Company in deed of trust or mortgage of 22nd of March, 1870."

On May 29, 1884, L. S. Lathrop, special master, filed his report recommending that $6,240.59 be allowed to the trustee.

No exceptions having been filed, on July 8th day, 1884, the trust company took an order in their equity order book vesting the filing of the report, "and more than one month having expired since the filing of said report, and it further appearing that no exceptions have been filed to said report by either party, therefore said report stands confirmed."

Allowance to L. S. Lathrop.

On February 28, 1885, the court allowed L. S. Lathrop $6,240 in addition to $3,000 previously allowed and paid for his services as special master, decreed that said $6,240 was a lien upon the railroad and other property of the Texas Trunk Railroad Company, embraced in mortgage foreclosed by decree of court in this case at January term, 1885, and that the same be subject to the satisfaction hereof to be enforced in the manner provided in decree of this court in this case at June term, 1885, confirming and sale to the special master of railroad and other property of the Texas Trunk Railroad Company had on the first Tuesday in May, 1885, for the purchasing trustee therein."

Numerous labor claims were also established as liens and paid out of the cash proceeds of the foreclosure sale hereinbefore mentioned.

Contract with O. T. Lyon & Co.

VII.

Shortly after the reorganization of the company under the purchase by Dickenson *et al.*, the company made a contract with O. T. Lyon and Company, to extend the road to Cedar, a point upwards of fifty miles from Dallas. This was done to save the charter
112 from forfeiture, it being necessary, under the law as construed by the attorney general, to build at least fifty miles of road by November 20, 1883, to prevent a forfeiture. This contract was completed and the company issued to O. T. Lyon & Co., its note for $130,000 and interest, which was transferred to E. M. Reardon, who held it in trust for O. T. Lyon & Co., and associates.

E. M. REARDON
vs.
T. T. R. R. Co.

Suit was brought by Reardon on this note, and on May, 18, 1885, in cause No. 5425, E. M. Reardon *vs.* Texas Trunk Railroad Company, (No. 2) in district court of Dallas county, Texas, judgment was rendered for plaintiff against the company for $149,102.76, with ten per cent. interests and costs.

On June 9, 1885, an execution to Dallas county issued on this judgment was levied upon the following-described property:

The railroad of the Texas Trunk Railroad Company including the entire road-bed, track, depots and depot grounds, offices and shops and right of way and appurtenances and the franchises and all charter powers and privileges of the Texas Trunk Railroad Company, its initial terminus, being near the city of Dallas, and its principal office situated in Dallas county, Texas, and also upon the following real estate to wit: (Here follows descriptions of tracts (*b*) and (*d*) described in plaintiffs' first amended original petition.) The execution was also levied on sundry cars, locomotives and other personal property.

Sheriff's Sale to J. E. Schneider et al.

On July 7, 1885, the property was sold under the above levy to J. E. Schneider, W. J. Keller and J. E. Henderson and associates for $119,320, and deed duly executed to them by the sheriff, dated July 8, 1885, acknowledged July 10, 1885, and recorded July 11, 1885, vol. 71 p. 44, Dallas county deed records. Said deed was also recorded August 4, 1885, vol. 38 p. 148, Kaufman county deed records. The unsatisfied portion of the execution was returned *nulla bona*.

At this sale the property was sold as follows:

Railroad, road-bed, tracks, depots, depot grounds, offices, shops, right of way and appurtenances, franchises and chartered powers and privileges	$110,000.00
25-acre tract	4,000.00
113 11.92-acre tract	1,000.00
2 locomotives	2,000.00
33 cars	2,000.00
Tools, tents, pumps, blankets, stationery etc	250.00
Safe	70.00
Total	$119,320.00

On July —, 1885, an alias execution on this judgment was issued to Kaufman county, and levied on July 13, 1885, on all the Kaufman county lands involved in this suit.

On August 4, 1885, the property was sold in bulk under this execution to J. E. Schneider, W. J. Keller and J. E. Henderson, "trustees" for $970 and deed duly executed by the sheriff to them dated August 4, 1885, acknowledged August 4, 1885, and recorded August 4, 1885, vol. 37, p. 260, Kaufman county deed records.

The purchasing trustees, Dickenson and others, under the foreclosure sale in the United States court, having, after due notice, as provided in the decree of confirmation, failed to pay the claims of A. S. Lathrop and International Trust Company, heretofore mentioned, (except $778.75 to the trust company, leaving the balance due $4561.55) on August 3, 1885, orders of sale were issued from the United States court to satisfy these claims, in which orders of sale the property was described as in the marshal's deed hereinafter set forth.

Marshal's Sale to J. E. Schneider et al.

The marshal's return to the International Trust Company writ, shows a levy on August 3, 1885, on the property as described in the writ, due advertisement, and sale on October 6, 1885, to J. E. Schneider, J. E. Henderson and W. J. Keller and their associates for $6000, and deed executed to them, and money applied as follows:

Marshal's cost	207.21
Sundry clerk's cost	241.50
International Trsust Company	$5,067.80
Total	$5,516.29

"and the balance placed as a credit on the order of sale in said cause in favor of A. S. Lathrop, special master, by direction of
114 plaintiffs' attorneys."

The return on the Lathrop writ shows like levy and advertisement, "and on 14 October, 1885, I paid to att'ys for pl'ffs, White & White, the sum of $483.41, balance of purchase-money received at sale of said property from J. E. Schneider *et al.*, in same cause under order of sale for benefit of trustees as per their receipt endorsed

thereon." Then follows receipt of marshal for $483.41 signed "White & White, att'ys for pl'ffs."

A deed was executed by marshal substantially in following form:

"Texas Trunk Railroad Company, by U. S. marshal,
"to
"J. E. Schneider *et al.* and associates. } Deed.

STATE OF TEXAS,
County of Dallas.

Know all men by these presents that whereas on the 3rd day of August 1885, there was issued out of the United States circuit court for the northern district of Texas sitting at Dallas, Texas, an order of sale in a case numbered (30) thirty wherein International Trust Company trustee is styled plaintiff and The Texas Trunk Railroad Company is styled defendant and directed and delivered to me as United States marslfal for the northern district of Texas and whereas by virtue of said order of sale and after advertisement as directed by law and between the hours of ten o'clock a. m. and four o'clock p. m. at the court-house door of the county of Dallas on the 6th day of October 1885 it being the first Tuesday of that month I sold the following-described property to wit: The entire railroad, road-bed, depots, depot grounds, offices, shops, etc. track, iron rails, bolts, &c. and all other property of every other description thereunto belonging from its terminus at or near the city of Dallas to its terminus in Kaufman county together with the entire right of way franchises and charter privileges of the Texas Trunk Railroad Company, the said railroad lying and being in the counties of Dallas and Kaufman and its principle public office being in Dallas county to J. E. Schneider, J. E. Henderson, W. J. Keller and associates being the highest and best bidders for the sum of six thousand dollars receipt whereof is hereby acknowledged. Now I, W. L. Cabell, U. S. marshal
115 as aforesaid and by virtue of said order of sale and these presents do sell, grant and convey to the said J. E. Schneider, J. E. Henderson, W. J. Keller and associates all the estate right title and interest the said Texas Trunk Railroad Company had on the 31st day of January, 1883, or at any time afterwards of in and to the foregoing-described property to have and to hold the said property unto the said J. E. Schneider, J. E. Henderson, W. J. Keller and associates their assigns and heirs forever as fully and as absolutely as I as United States marshal as aforesaid can convey by virtue of the said order of sale.

In witness whereof I have hereunto set my hand this the 6th day of October, 1885.

W. L. CABELL,
United States Marshal, Northern District of Texas."

This deed was acknowledged October 14, 1885, and recorded October 15, 1885, vol. 71, p. 448, Dallas county deed records. Said deed was also recorded October 22, 1885, vol. 38, p. 617, Kaufman county deed records. The purchasers under this order of sale, and under the sales under the Reardon judgment, were the same.

Organization of Third Company.

On November 13, 1885, J. E. Schneider, W. J. Keller, J. E. Henderson and associates, claiming title under the above three sales to them, met and organized the company, with a paid-up capital of $750,000, in shares of $100, representing the purchased property, provided for distribution of these shares, appointed T. L. Marsalis, A. Sanger, J. E. Schneider, W. G. Mowry, John L. Henry, Frank L. Russ, and W. W. Weigley, directors, John L. Henry, president, J. E. Schneider, vice-president, William Gleason, secretary, and W. G. Mowry, treasurer. The several deeds to the purchasing trustees above named were ordered recorded in the minute book of the company.

The reorganization last above mentioned will, for purposes of distinction, be called Texas Trunk Railroad Company No. 3.

The proceedings were sufficient to vest in this company the title to all property acquired by the purchasing trustees under the three sales last above mentioned.

Transfer to W. W. Weigley et al.

By several instruments in writing executed on or about
116 November 13, 1885, the original purchasers under the Reardon executions and the marshal's sale, who had become the stockholders of the reorganized company No. 3, transferred to W. W. Weighley and associates their stock in said company and sundry claims, judgments and decrees against the first and second companies.

Central Trust Co. Mortgage.

VIII.

On August 30, 1888, the Texas Trunk Railroad Company (No. 3) duly executed to the Central Company as trustee a mortgage on its railroad etc., describing the mortgaged property as follows:

"The railroad already constructed and to be constructed, of the party of the first part, situated in the counties of Dallas and Kaufman, in the State of Texas, extending from the city of Dallas in said county, of Dallas, to Cedar station in said county of Kaufman, consisting of a main line upwards of fifty miles in length, and also all the rights of way, track, side tracks, ties, rails, culverts, bridges, stations, water stations, machine shops, structures, rolling stock, locomotives, cars, tenders, machinery, implements, iron, materials, lands, tenements and other property, chattels, choses in action and things pertaining to said railroad owned or to be owned by said party of the first part, or used or acquired or to be used or acquired by the said party of the first part in and for the construction, repairs, renewal, improvements, completions, operation or management of the said railroad, and together will the chartered and corporate rights, privileges and franchises now possessed or which shall hereafter be

acquired by the party of the first part, including the franchise to be a corporation, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion, remainders, tolls, incomes, rents, issues and profits thereof, and also all the right, estate, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity or otherwise howsoever of the said party of the first part, of, in and to the same and every part thereof."

This mortgage was executed to secure $1,000,000 in bonds, and was duly recorded in Dallas county, May 20, 1889, and in
117 Kaufman county, June 6, 1889. It contained the usual provisions authorizing the trustee to represent the bondholders and other provisions usual in railroad mortgages, including a provision and authorizing a foreclosure for default in payment of semi-annual interest.

R. F. Aspley to T. T. R. R. Co. } Deed.

IX.

On March 19, 1889, R. F. Aspley, by G. J. Gooch, attorney-in-fact, executed to the Texas Trunk Railroad Company a quitclaim deed to the following-described land:—

Situated in Dallas county, Texas, part of the John Grigsby league and labor survey, and described by metes and bounds as follows:—Beginning at a point on the west side of the right of way of the Texas & Pacific Railroad 50 ft. E. from the center line of the road-bed of the Texas Trunk railroad at right angles thereto; thence southeasterly 50 ft. from and parallel to the center line of the road-bed of said Texas Trunk Railroad to the S. line of the John Grigsby league and labor surver; thence southwesterly with said league and labor line across said Texas Trunk railroad to a point 100 ft. from above point of intersection and 50 ft. W. of the center of said railroad bed; thence northwesterly 50 ft. from and parallel to the center line of the road-bed of said Texas Trunk railroad to the S. line of right of way of the Texas & Pacific railway; thence easterly along said S. line to the place of beginning, embracing a strip 100 ft. wide, 50 ft. on each side of the center line of said Texas Trunk railroad between said Texas & Pacific railroad and the S. line of said Grigsby league.

The recited consideration was $500 paid. The deed was acknowledged November 15, 1899, and recorded June 8, 1891, vol 146, p. 223 Dallas county deed records.

Aspley claimed an interest in the Grigsby survey as one of the heirs of the original grantee's wife.

STATE OF TEXAS
vs.
T. T. R. R. Co.

X.

On September 25, 1889, the State of Texas, by its attorney general, filed an information in the nature of a *quo warranto* in the district court of Dallas county, against the Texas Trunk Railroad
118 Company, as then organized, for the purpose of having declared forfeited the charter and franchises of the company. The style of this suit was No. 7656, The State of Texas *vs.* Texas Trunk Railroad Company. The petition contained a prayer for the appointment of a receiver, and, on the same day the petition was filed, John H. Traylor was appointed receiver of all the company's property, and he immediately qualified and took possession, and proceeded to operate the road.

On October 23, 1889, on motion of defendant, the venue was changed to Ellis county. On November 25, 1889, on motion of defendant the district court of Ellis county vacated the order appointing a receiver, and the receiver was discharged and the possession of the company's property returned to it the suit still remaining pending.

On July 28, 1891, a second motion by the State for the appointment of a receiver was refused.

On September 14, 1891, a final judgment was rendered declaring a forfeiture of the company's charter, dissolution of the corporation, and appointing John H. Gaston receiver of all the company's property. On appeal by defendant this judgment was affirmed by the supreme court, January 15, 1892. The order appointing Gaston as receiver authorized and directed him to take possession of all property of the railroad company owned at the institution of this suit, or at any time since.

Gaston at once qualified as receiver, and he is still acting in that capacity, the receivership never having been closed. However, he did not obtain possession of the property described in the Central Trust Company mortgage above mentioned, the same being in possession of a receiver of the United States court, as more fully appears by other parts of this agreement.

The judgment rendered on the 14th day of September, 1891, by the Ellis county district court in the suit of The State of Texas *vs.* The Texas Trunk Railroad Company, hereinbefore referred to, forfeiting the charter of said company and appointing John Gaston receiver is as follows:

In District Court of Ellis County, Texas.

THE STATE OF TEXAS *ex Rel.* }
vs. } No. 2743. To Forfeit Charter, etc.
TEXAS TRUNK RAILROAD. }

SEPTEMBER 14, 1891.

On this day came The State of Texas by C. A. Culberson,
119 attorney general, and the defendant, The Texas Trunk Railroad Company, by its attorneys A. T. Watts and Lafayette Fitzhugh, and both parties announced ready for trial, and waiving a jury, submitted the issues of fact as well as of law to the court, and the court having heard the pleadings, evidence and argument of counsel, is of the opinion that the law and fact- are with the plaintiff, The State of Texas, and that it is entitled to the relief sought in its information.

It is therefore considered, ordered and decreed by the court that the corporation known as the Texas Trunk Railway Corporation existing and chartered under the laws of the State of Texas, by virtue of its articles of incorporation filed with the secretary of state November 6, 1879, be and the same is hereby ousted of all its franchises, and is hereby dissolved, its charter and franchises forfeited, and that said company shall no longer exercise the right to own, control, maintain or operate said railway, or any part thereof, or to further enjoy the franchises or privileges granted by its said charter.

And the application and motion of the plaintiff, The State of Texas, to appoint a receiver in this case of the property of the defendant coming on to be heard, the court is of the opinion that the law and facts are with the plaintiff on said application and motion. And it appearing to the court that J. H. Gaston is a citizen of the State of Texas, and a resident of Dallas county, in said State, and he is not and has not been of counsel in said cause, and is not and has not been interested in any matter in controversy in this cause, and that said John H. Gaston is a qualified voter in this State, and in all ways fit and qualified for said office of receiver, it is therefore considered, ordered and decreed by the court, that said John H. Gaston be and he is hereby appointed receiver of all the property and effects of the said defendant, The Texas Trunk Railroad Company, and his bond as such receiver is fixed at the sum of ten thousand dollars to be made and conditioned as required by law.

It is further ordered and decreed by the court that when said John H. Gaston shall have qualified as aforesaid by making the bond herein required and taking the oath prescribed by law,
120 thereupon shall said John H. Gaston as receiver be vested with authority to demand and receive and carefully keep the railroad, road-bed, land, iron rails, ties, depots, depot grounds, rou-d-houses, engines, cars and all other property of every nature and description whatsoever, whether real, personal or mixed, belonging to or owned by said Texas Trunk Railroad Company at the time of the commencement of this suit, on, to wit, the 2nd day of November 1889, or at any time since then, and the officers, agents, servants and attorneys of said Texas Trunk Railroad Company and all other

persons are required to deliver to the said receiver, upon his demand, any and all property aforesaid now in their possession, or in the possession of any one or more of them.

It is further ordered and adjudged by the court that said receiver, when he shall have qualified as aforesaid, be and he is hereby authorized to institute and prosecute all such suits for the possession and recovery of any and all such property aforesaid as may be held or claimed adversely to him as any person firm or corporation whatever, and to this end for the purpose of such advice as said receiver may need or require said receiver be and he is hereby authorized, to employ counsel. And it is further ordered and decreed by the court that the said receiver be and he is hereby authorized, when he has received or recovered the railroad of the said Texas Trunk Railroad Company, or any part thereof, and has the same in his possession as authorized by this decree, to manage, control and operate the same until further orders of this court.

The said receiver shall, from time to time, report to this court and receive such further authority and instructions from the court as in the business of the said receivership shall be found necessary and proper. Said receiver shall, from time to time, return into this court an accurate description and inventory of all property which may come into his possession pursuant to this decree.

It is further ordered, and adjudged that the defendant pay all costs in this behalf expended, for which let execution issue, to which judgment and each and every part thereof, the defendant, The Texas Trunk Railroad Company, and at the announcement and rendition thereof, in open court, excepted and then and there in open court gave notice of an appeal to the supreme court of

121 Texas.

It is further agreed that said Gaston has never resigned as receiver in said cause and that no order has ever been made or rendered by the court in said cause removing or discharging him as such receiver.

XI.

On August 19, 1891, the following suits were instituted against the Texas Trunk Railroad Company:

North Texas Nat'l Bank
vs.
T. R. R. Co.

North Texas Nat'l Bank of Dallas, No. 9304, in district court of Dallas county, Texas, for $7,839.98.

W. G. Armstrong & Bros.
vs.
T. T. R. R. Co.

W. G. Armstrong and Bros. No. 9306, in same court, for $575.78.

MORONEY HARDWARE CO.
vs.
T. T. R. R. CO.

Moroney Hardware Company, No. 6250, in J. P. court, Dallas county Texas, for $192.04.

KANE SHIELDS
vs.
T. T. R. R. COMPANY.

Kane Shields, No. 6263, in same court, for $81.85.

Attachments were issued the same day in each of said suits and levied on the railroad, etc. of defendant company, and on all of its real and personal property in Dallas county. The levies were made on August 19th and 20th, 1891.

James Moroney Appointed Receiver.

On September 15, 1891, the said bank filed in its suit a receipt for the appointment of a receiver of all the property of said railroad company, and the same day presented it to the judge of the district court of Dallas county, who thereupon made an order returnable September 8, 1891, at 9 a. m. directing that defendant company, be notified to show cause, if any, why a receiver should not be appointed. The defendant company was served with notice of this order on September 7, 1891, at 1.45 p. m.

The hearing of said application was postponed until September 10, 1891 when said district court of Dallas county made an order appointing James Moroney receiver of all the property of said railroad company, and the said James Moroney immediately qualified as such receiver.

The petition for appointment of a receiver was made on behalf of the bank and all other creditors of the railroad company.

CENTRAL TRUST CO.
vs.
T. T. R. R.

On September 7, 1891, at 9.15 o'clock p. m. the Central
122 Trust Company filed with the clerk of the United States circuit court for the northern district of Texas at Dallas, its original bill in equity against the Texas Trunk Railroad Company, alleging the issuance of said $1,000,000 in bonds, and the execution of the mortgage to it securing the same, default in interest, the insolvency of the railroad company, and praying for the appointment of a receiver and foreclosure of the mortgage.

Endorsed on the bill was a recommendation by both complainant and defendant that Charles Dillingham be appointed receiver, dated New York, September 2, 1891.

The bill was endorsed and signed by Judge Pardee as follows:—"Filed before me this 4th day of September, 1891. Don A. Pardee, judge."

Charles Dillingham Appointed Receiver.

Appended to the bill and filed with it was an order made "In chambers, September 4, 1891, '2" and signed "Don A. Pardee, circuit judge," appointing Charles Dillingham receiver in the cause as prayed in the bill, and directing him as such to take possession of and operate the property and vesting in him powers usually vested in receivers appointed in suits for the foreclosure of mortgages on railroads.

The order also provided that Dillingham should, within ten days after taking possession of the property, give bond in the sum of $10,000, condition for the faithful performance of his duties as receiver, the bond to be approved by the clerk of the court.

Attached to the bill and filed with it was the following:

"CENTRAL TRUST CO. OF NEW YORK
vs.
THE TEXAS TRUNK RAILROAD COMPANY.

The Texas Trunk Railroad Company, defendant in the above-entitled suit, hereby admits service upon it of a copy of the bill of complaint therein and of notice of the intention of complainant to apply to Hon. Don A. Pardee for the appointment under such bill of a receiver of the properties covered by the mortgage referred to therein, and consents that such application may be heard before said judge in chambers at any place within or without his circuit without further notice.

(Signed) TEXAS TRUNK R. R.
S. H. KNEELAND, *Pres't.*"

123 After the filing of the said bill and order etc. with the clerk at Dallas and on the day following, that is, September 8, 1891, Charles Dillingham, as such receiver, made demand of the defendant, The Texas Trunk Railroad Company, for the possession of the property of which he was appointed receiver, and said company forthwith delivered to him the books, accounts, vouchers, money, and all other personal property of said company then being and situated in its general offices in the city of Dallas, and then and there placed said Charles Dillingham in possession of said general offices and of all the property of said company so far as said company was able to do.

On September 10, 1891, Dillingham filed his oath and bond as receiver.

Dillingham's Petition to Federal Court for Writ of Possession.

On the same day Dillingham filed a petition in the said United States court, addressed to Hon. A. P. McCormick, who was United States district judge, praying for an order requiring James Moroney, receiver of the State court, and W. H. Lewis sheriff, to

surrender the railroad property. On September 12, 1891, the respondents answered, denying the validity of Dillingham's appointment as receiver on the ground that the order was made in the State of Ohio, beyond the territorial jurisdiction of the northern district of Texas, and the fifth circuit, and that the order was made in vacation before the bill was filed; and also contending that under the facts heretofore stated the jurisdiction of the State court first attached; and also contending that the State court was a court of concurring jurisdiction, in actual possession, and that its possession could not be disturbed by mere motion made before a judge of another court in vacation, but the proper procedure was to apply by petition in the State court.

Judge McCormick's Order.

On September 12, 1891, Judge McCormick made an order in chambers requiring the sheriff and State court receiver to surrender the property to the Federal receiver:

Counter-order of State Court.

On application for instructions the State court ordered the sheriff and State receiver not to surrender the property. The situation remained unchanged until September 24, 1891, when the claims of the above creditors suing in the State courts were settled
124 and the State receiver discharged, whereupon Dillingham took possession. The following is a copy of the judgment discharging James Moroney, the State receiver.

Settlement of Controversy and Discharge of State Receiver.

THE NORTH TEXAS NAT'L BANK
vs.
THE TEXAS TRUNK R'Y CO. } 9304.

THURSDAY, *September* 24, 1891.

On this the 24th day of September, 1891, it being made to appear to the court by an agreement between the plaintiff and the defendant now on file, that the receivership heretofore established by an order of this court over the property of defendant may be vacated. It is therefore considered by the court, and so ordered, adjudged and decreed that said receivership be vacated and discontinued and said James Moroney receiver is hereby discharged from further duty as such receiver. And it further appearing to the court by an agreement of the parties that Charles Dillingham, a citizen of Harris county, Texas, had been appointed receiver of the property of the defendant company by an order of the United States circuit court for the northern district of Texas, and has appeared in this court and asked possession of said property now held by James Moroney, receiver, appointed by this court and W. H. Lewis by writs of attachment issued from this court. It is therefore ordered, adjudged and

decreed that James Moroney, receiver, and W. H. Lewis, sheriff of Dallas county, deliver forthwith to Charles Dillingham aforesaid all of the property of the Texas Trunk Railway Company held by them or either of them as receiver of sheriff aforesaid by virtue of any process in this cause. Upon the delivery of the property aforesaid to said Chas. Dillingham, it is adjudged that the said Moroney be released of all liability as receiver appointed by this court.

Dismissal of State Court Suits.

The suits in the State court were subsequently dismissed, that of the bank October 19, 1892, W. G. Armstrong & Bros. October 20, 1892, Moroney Hardware Co., September 23, 1892, and Kane Shields, September 23, 1892.

Orders in Central Trust Co. Suit.

In said suit of Central Trust Company *vs.* Texas Trunk
125 Railroad Company there were numerous proceedings of an interlocutory character, not deemed necessary to recite.

Decree Pro Confesso.

On January 4, 1892, a decree *pro confesso* was entered against the railroad company for failure to appear, plead, answer, or demur to the bill of complaint.

Resignation of Dillingham, Receiver.

On November 30, 1892, the resignation of Charles Dillingham as receiver was accepted by A. P. McCormick, U. S. circuit judge, (he having been appointed circuit judge of the fifth circuit) with directions to preserve the property etc. until otherwise ordered.

Appointment of Atkins Receiver.

On December 3, 1892, Judge McCormick appointed Geo. T. Atkins receiver, and directions were made for turning the property over to him.

On December 5, 1892, Atkins qualified as receiver, and took possession.

Bill of Revivor Against Gaston, Receiver.

On January 8, 1894, the Central Trust Company filed its bill of revivor against John H. Gaston, receiver appointed by the district court of Ellis county, alleging the prior proceedings both in the Federal and State courts, and praying that the foreclosure suit in the Federal court be revived against Gaston receiver.

Gaston's Plea.

On March 5, 1894, Gaston, receiver, filed a plea to the bill of revivor challenging the jurisdiction of the Federal court on substan-

tially the same grounds set up by the North Texas national bank in the proceedings heretofore set forth.

Order Reviving Suit.

On July 9, 1894, the Federal court, John B. Rector, U. S. district judge presiding, made an order overruling Gaston's plea, and reviving the suit against him, as prayed for by complainant, and allowing until September, 1894, rules to answer the original bill, subject to all proceedings theretofore taken against the railroad company.

Decree Pro Confesso Against Gaston.

On November 5, 1894, a decree *pro confesso* was taken against Gaston, receiver for failure to answer.

Gaston's Cross-bill.

126 On January 12, 1895, Gaston, receiver filed his cross-bill, praying for possession of the property in the possession of Atkins, receiver, claiming a right to recover possession under the facts heretofore recited.

Motion to Strike Out Order Sustaining Motion.

On February 2, 1895, the Central Trust Company filed a motion to strike out Gaston's cross-bill. On February 5, 1895, this motion was granted.

Final Decree of Foreclosure.

On February 26, 1895, a final decree of foreclosure and sale entered, establishing the bonded debt at $1,000,000 principal, and $308,814.33 past-due interest, and ordering sale of the mortgaged property, described in said decree in the same language as in the mortgage, making special provisions as to the terms of sale and application of proceeds not deemed material to set forth, and appointing A. T. Watts special commissioner to execute the decree. On April 1, 1895, the above final decree was amended in some particulars not deemed necessary to set forth.

Sale to Edward H. Pardee.

On August 27, 1895, A. T. Watts, special commissioner, filed his report of sale to the effect that after proceeding according to the terms of the decree he sold the property therein described on August 6, 1895, to Edward H. Pardee for $250,000.

Confirmation of Sale.

On September 27, 1895, on motion of complainant trustee and after notice to Gaston, receiver, Judge McCormick made an order in vacation confirming the sale. On March 3, 1896, in term time the

court made an order approving the former order confirming the sale.

On March 16, 1896, an order was entered which provided, among other things not deemed material to set forth, as follows:

Order to Complete Sale.

It is ordered and decreed that within thirty days from this date unless the time shall be enlarged by the court or a judge thereof, Edward H. Pardee, the purchaser of the railroad and other property sold under the decree of foreclosure in this cause, upon the delivery to him by A. T. Watts, who was appointed special master commissioner, to execute the final decree of foreclosure and sale herein, of a deed or deeds to said Pardee duly made and executed of the property sold; and upon the delivery by the receiver appointed
127 in this suit of good and sufficient deeds of conveyance or evidence of transfer to said Pardee of any and all property sold which is vested in or standing in the name of said receiver or to which said receiver has in any manner acquired the title and upon like delivery of a deed or deeds of assurance to said Pardee of the property sold under the decree herein to be executed according to law by John H. Gaston, receiver, of the Texas Trunk Railroad Company, shall pay to said A. T. Watts, special master commissioner, the balance of the purchase price of said property not heretofore paid to wit: the sum of two hundred and forty thousand dollars, either in cash or by paying over and surrendering to said special master commissioner receiver's certificate heretofore issued by the order of the court in this cause, such receiver's certificate to be received on account of such balance of said purchase price at par and accrued interest thereon to the date of the surrender thereof to the said special master commissioner, provided that the price or value at which such certificates are received shall not exceed the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price was paid in cash; and upon such purchaser's so paying, satisfying and making good the said balance of his bid, the railroad and property so sold shall be, upon demand of said purchaser or his assigns, delivered to said purchaser by the receiver herein; and said receiver shall pay over to the special master commissioner all the earnings of the receivership then remaining in his hands or thereafter collected by him and file his final report as such receiver.

The said Edward H. Pardee having paid the balance of his bid and in all respects complied with the terms of the decree of foreclosure under which he purchased the property and within the time fixed in the above decree of March 16, 1896, A. T. Watts, special master commissioner, and George T. Atkins, receiver in said cause, and John H. Gaston, receiver of the Ellis county district court in the *quo warranto* proceeding pending in said court as hereinbefore stated; and against whom said foreclosure proceeding in the Federal court was revived, made, executed and delivered to the said Edward H. Pardee on the 9th day of April 1896, a deed purporting

to convey to him all and singular the property purchased by him at said foreclosure sale as hereinbefore set out, of which deed the following is a correct copy except the certificate of acknowledgment:—

Deed to Edward H. Pardee.

This indenture made and entered into this 9th day of April, 1896, by and between A. T. Watts, as special master commissioner, part of the first part, and John H. Gaston as receiver of the Texas Trunk Railroad Company, appointed by the district court in and for
128 Ellis county, Texas, as hereinafter stated, party of the second part, and George T. Atkins as receiver, appointed by the circuit court of the United States for the northern district of Texas, in the suit in said circuit court hereinafter referred to, party of the third part, and Edward H. Pardee of the city of New York *of* the State of New York, party of the fourth part, witnesseth:

That whereas a certain decree was *required* in the circuit court of the United States, for the northern district of Texas, in the fifth circuit, on the 26th day of February 1895, in a certain cause then pending in said court under the title of "Central Trust Co. of New York *vs.* John H. Gaston, receiver of the Texas Trunk Railroad Company," and bearing the number 193 on the chancery docket of said court, wherein and whereby it was adjudged and decreed that the Texas Trunk Railroad Company, or its successors, or John H. Gaston, as receiver of the Texas Trunk Railroad Company, should within thirty days of the entry of said decree, pay, or cause to be paid, to the complainant, or to the clerk of said court, for the use and benefit of the holders of the bonds secured by the mortgage in said decree referred to and of the unpaid interest warrants or coupons appertaining thereto, the sum of $308,814.33 in gold coin of the United States, with interest thereon from the date of the entry of said decree to the date of payment, and also the costs of suit to be taxed in said cause, and wherein and whereby it was further adjudged and decreed that unless the said payment should be made within the time directed as aforesaid, the said mortgage should be foreclosed, and all property, rights or interests conveyed thereby, and upon which said mortgage was a lien, as the said property was in said decree particularly described, should be sold as in the said decree directed, and that under and by said sale, all equity of redemption of the defendant in said cause, as well as of any and all persons represented by any of the parties to said suit, of, in and to said mortgaged premises, property, rights and franchises, and every part and parcel thereof embraced or included, or intended to be, in the said mortgage, should be foreclosed and cut off and forever barred.

And, whereas, the said Texas Trunk Railroad Company
129 and its successors and the said John H. Gaston, as receiver of the said Texas Trunk Railroad Company, wholly failed to pay the said sum of money so directed to be paid within the time ordered, or otherwise, and thereupon the said A. T. Watts, as special master commissioner appointed by said decree, gave due notice of such sale of said mortgaged property and premises and of

the time and place thereof in accordance with the direction of said decree, as modified by the further decree of said court in said cause filed April 1st, 1895.

And whereas, pursuant to said decree, the said special master commissioner did, at the time and place specified in such notice of sale, offer the said mortgaged property and premises, hereinafter described, for sale at public auction, without valuation, appraisement, redemption or extension as an entirety and not in separate parcels, and, thereupon the said Edward H. Pardee became the highest bidder for the said mortgaged property and premises at the sum of two hundred and fifty thousand dollars, and was thereupon adjudicated by the special master commissioner to be the purchaser thereof, and said sale and bid having been by said special master commissioner duly reported to the said court, and having been in all things confirmed by the said court by an order of confirmation duly entered in said cause on the 27th day of September, 1895, in vacation, and by further order of confirmation duly entered in term in said cause on the third day of March, 1896, and the said purchaser having fully complied with the terms of said decree and his purchase, and the said special master commissioner having been directed by the court to execute and deliver to said purchaser a deed of the property and premises so sold and purchased as aforesaid:

Now therefore, in consideration of the premises and for the purpose of giving full effect to such sale, and in execution of the decree and order of said court above set forth, and in consideration of the payments made by said purchaser in accordance with such decree and order, the said A. T. Watts, special master commissioner, as aforesaid, hath granted, sold and conveyed, and doth by these presents grant, sell and convey unto the said Edward H.
130 Pardee of the city, county and State of New York, all and singular the mortgaged property and premises so sold as aforesaid which are described in said decree of foreclosure and sale as follows, to wit: The railroad already constructed and to be constructed of the Texas Trunk Railroad Company situate in the counties of Dallas and Kaufman in the State of Texas, extending from the city of Dallas in said county of Dallas to Cedar station in said Kaufman county, consi-ting of a main line upwards of fifty miles in length, and also all rights of way, tracks, side tracks, ties, rails, culverts, bridges, stations, water stations, water tanks, depots, car-houses, engine-houses, machine shops, structures, rolling stock, locomotives, cars, tenders, machinery, implements, iron, materials, lands, tenements and other property, chattels, choses in action and things pertaining to said railroad owned or to be owned by said railroad company, or used or acquired or to be used or acquired by said railroad company in and for the construction, repairs, renewal, improvement, completion, operation or management of the said railroad, and together with all the chartered and corporate rights, privileges and franchises then (*i. e.*, at the time of the execution of the mortgage hereinbefore referred to) possessed, or which should thereafter be acquired, by the railroad company, including the franchise to be a corporation, together with all and singular the

tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and also all the right, estate, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, or otherwise howsoever, of the said railroad company of, in and to the same and every part thereof;

To have and to hold the said property and premises with the appurtenances, rights and franchises and each and every part thereof so sold and hereinbefore described to the said Edward H. Pardee, his heirs, executors, administrators and assigns forever, free and discharged of and free from the lien of the mortgage foreclosed as in said decree mentioned, and from the claims of the parties to said suit, or either of them, or any intervenors therein or any persons claiming or to claim thereunder.

131 The price and consideration of the said sale is the sum of $50,000, which said sum has been paid by the said Edward H. Pardee as provided in the decree of February 26, 1895, and consequent decrees in said cause, the receipt of which same is hereby acknowledged and acquittance given therefor to said party.

And now John H. Gaston, as receiver of the Texas Trunk Railroad Company, appointed on or about the 14th day of September, 1891, by the district court in and for Ellis county, Texas, in a s-it pending in said court wherein The State of Texas was plaintiff and The Texas Trunk Railroad Company was defendant, and wherein the charter of said railroad company was, on that day by judgment, forfeited and dissolved against whom, as such receiver, said cause No. 193, on the chancery docket of the circuit court of the United States for the northern district of Texas at Dallas, entitled, as aforesaid, Central Trust Company *vs.* John H. Gaston, receiver of the Texas Trunk Railroad Company, was on a bill of revivor filed by complainant revived by an order and decree rendered on the 9th day of July, 1894, and in obedience to the terms of said final decree dated February 25, 1895, and consequent decrees in said cause No. 193, requiring him so to do, in consideration of and by authority of, and in compliance with the requirements of the aforesaid decree in said cause No. 193, does, by these presents, grant and convey unto the said Edward H. Pardee, of the city and State of New York, all and singular the railroad, lands, premises and all other property and rights conveyed by the said mortgage foreclosed as aforesaid in said equity cause No. 193, and sold as aforesaid by the said A. T. Watts as special master commissioner, and hereinbefore described. To have and to hold, all and singular, the said premises unto the said Edward H. Pardee, his heirs and assigns forever, as fully as he, the said John H. Gaston as receiver, as aforesaid, is lawfully authorized to grant and convey by virtue of said final decree of foreclosure rendered as aforesaid on the 26th day of February 1895, in said equity cause No. 193, in the circuit court of the United States and the decrees confirming said sale, and the decrees of March 6, 1891, in said cause.

And in obedience to the terms of said final decree, dated February 26, 1895, and consequent decrees in said cause in said circuit

court of the United States, the said George T. Atkins, as receiver, as aforesaid, has granted, conveyed and transferred, and hereby grants, conveys and transfers unto the said Edward H. Pardee, to have and to hold to him his heirs, executors administrators, and assigns forever, any and all property sold by said special master commissioner, as aforesaid, which is vested in or standing — the name of
132 said last-mentioned receiver, or to which said last-mentioned receiver -as in any manner acquired title, including all and singular the land, premises and property and rights of every kind and description described in the final decree rendered on the 16th day of July, 1895, in cause No. 275, on the chancery docket of the said circuit court of the United States in and for the northern district at Dallas, entitled "George T. Atkins, receiver *vs.* C. T. Campbell, *et al.*" together with all the rights of said receiver as complainant in said suit under said decree to which decree and to the record thereof in said court reference is here made.

In witness whereof the said A. T. Watts, special commissioner, and the said John H. Gaston, receiver, and the said George T. Atkins, receiver, have hereunto set their respective hands and seals the day and year first above written.

(Signed) —— ——.

All erasures and interlineations made before signing.

A. T. WATTS,
Special Master Commissioner.
JOHN H. GASTON,
Receiver of Texas Trunk Railroad Com.
GEORGE T. ATKINS, *Receiver.*

Petition to Remove Atkins, Receiver.

On August 5, 1896, the following petition was presented to Judge McCormick in chambers:—

To the judge of the United States circuit court in and for the northern district of Texas:

Your petitioner, Edward H. Pardee, a citizen of the State of New York, respectfully represents that, as shown by the records of this cause, he purchased under the decrees of foreclosure and sale made and rendered in this cause, all and singular the railroad, property, and rights in the custody of this court in this cause and now held and possessed by George T. Atkins, as receiver in this court, and appointed and acting in this cause, and that he has paid the price bid by him and otherwise complied with the terms of such sale and has received from the master commissioner making such sale, and from the said receiver, and from the said John H. Gaston, receiver, defendant herein, a deed to said property as authorized by the orders of this court herein.

Petitioner further states that he is entitled as such purchaser, under the laws of the State of Texas, to form with certain other persons associated with him, a corporation with the powers, franchises

and privileges conferred by the general laws of Texas upon railroad corporations for the purpose of acquiring, owning and operating said railway, with the right, among others, to extend the same, and that he with a number of associates acquired by law and who possessed the necessary qualifications has prepared,
133 adopted and duly signed articles for incorporating such company, and has agreed with them upon terms for the acquisition of said railroad and property by the corporation to be thus formed. That after the execution of such articles of incorporation, as aforesaid, petitioner caused the same to be submitted to the attorney general of Texas, whose duty it is under the law to examine the same, and if found to be in accordance with the provision of the statutes of the State not in conflict with the laws of the United States, or of Texas, to attach thereto his certificate to that effect, without which such articles are not entitled to be filed in the office of the secretary of state and he also presented the said articles of incorporation and the aforesaid deed to him duly authenticated, together with certified — of the decrees of this court in this cause showing such sale. But the petitioner says the attorney general, upon considering said articles and document, expressed some doubt regarding the jurisdiction of this court to decree such sale in reference to the validity of the sale under which petitioner claims, as aforesaid, and desired reasonable time for the examination into and consideration of such questions before acting upon petitioner's application for his approval on said articles of incorporation.

Petitioner says that said attorney general still has said application under consideration, and that he has earnestly endeavored, without success so far, to secure the approval of said application. That until said articles of incorporation shall be approved by the attorney general petitioner and his associates cannot form such corporation and carry out the terms agreed upon by them for the acquisition and operation of said railroad by such proposed corporation. Petitioner is advised and believes that he, with his associates is entitled to form such corporation under the laws of Texas, and that said questions respecting the jurisdiction of this court and in reference to the validity of the sale, under which petitioner claims, are without merit and the same will ultimately be so determined.

Petitioner further represents that under the orders of this court heretofore made in this case the compensation of, said Atkins, as receiver herein was established and fixed at the time of such order, and that it was provided that he should be paid at the rate of $460 per month in full for his services as receiver thereafter rendered, and to continue so long as the property in his hands should remain in the custody of this court in this cause. Petitioner avers that William White has been superintendent of the railroad in the custody of this court in this cause ever since it was taken into the custody of this court, acting as such under the direction and control of the receiver herein, and has been immediately and actively in charge of the man-
134 agement and operation of said railroad and property; that the said White is an experienced and thoroughly competent railroad man, and, *and* as petitioner believes, is well qualified and

competent to run and operate said railway and preserve and manage the same under the orders of this court, and petitioner believes that he, the said White, would be willing to perform all the duties now or hereafter incumbent upon a receiver in this cause for the same compensation or very little compensation in addition to that which is -ow being and has long been received by him as such superintendent: and that if he was substituted as receiver herein for the said George T. Atkins, the monthly compensation of $460 paid and being paid to the said Atkins, or the greater part thereof, could and would be saved. That the said railroad and property is unprofitable, as shown by the records in this cause, and petitioner is informed and believes that the earnings of the same for the entire period of this receivership have not been more than sufficient to pay its expenses during such period, and that its earnings are not, and are not likely to be during this receivership, more than sufficient to pay the operating expenses. Petiti-ner says that he is advised that the rights of the various creditors and claims upon the property placed in the custody of this court herein have been adjudicated and were determined by the final decree and other orders herein, and that upon completion of the sale of such property attached to the proceeds of said sale to the extent provided in such orders and decrees, and that they hereafter cease with reference to said railroad and property which belongs now and is owned by your petitioner.

Petiti-ner says that he has explained the situation, and herein stated to the -aid George T. Atkins receiver, has requested him to resign as such in order that petitioner might make an application to your honors for the appointment of the said White as receiver, for the sole purpose of saving the expenses to said property, of $460 per month now being paid to the said Atkins as such receiver, but that the said Atkins has refused to resign the said position as such receiver.

Premises considered, petitioner prays your honors, solely in the interest of economy in the administration of the property in the custody of this court herein, to remove the said Atkins as receiver and to appoint the said William White in his stead with the same powers and duties, and for such other and further relief as petitioner may be entitled to in the premises.

Order Removing Atkins, Receiver.

On August 5, 1896, Judge McCormick made the following order on said petition:

On consideration of the foregoing petition it is hereby ordered and decreed that said George T. Atkins, the receover in this cause
135 be, and he is hereby removed as such receiver, such removal to take effect on the first day of September 1896, and only after the said White shall have filed bond with two or more good and sufficient sureties, in the sum of ten thousand dollars, to be approved by the clerk of this court, conditioned the same as the bond heretofore filed herein by the said Atkins as receiver. And upon the approval and filing of such bond, and the taking of the oath

required of him as such receiver by the said White the said George T. Atkins shall, on the first day of September 1896, or as soon thereafter as the said White shall qualify as aforesaid, surrender to him as such receiver, the custody, possession and control of all the property and rights of every kind and character whatsoever, and all books and record-, and paper in his hands or under his control as such receiver or pertaining to such receivership; but no inventory or formal delivery thereof shall be required, but this order shall of itself operate without further act as a complete delivery of all such property, rights, books, papers and records, and everything pertaining to this receivership, and as a substitution of the said White for the said Atkins as receiver herein without further act, upon the said first day of September, 1896, or as soon thereafter, as the said White shall file such bond and take, such oath.

And as this change of receivers is grounded solely on consideration of economy in the operation of the property pending the present embarrassment in its disposition, it is expressly provided that the said William White during the whole period of his receivership shall continue to discharge fully all the duties of superintendent without additional assistant, and shall receive in full of his compensation for his services and responsibility as receiver and superintendent combined only the amount as compensation he is now receiv*e*ring as superintendent.

August 5, 1896.

Said petition and order were filed on August 11, 1896.

On —— —, 1896, William White filed the oath and bond required by the above order, and took possession as receiver and is still acting as such.

Judgment in Favor of W. B. Nason et al.

XII.

Judgments were rendered against the Texas Trunk Railroad Company, (No. 1) in favor of W. B. Nason, W. A. Rogers, W. A. Nason, Thomas J. Elam, John Shawyer, Gaston & Thomas, J. E. Gill, Isaac Roberts, J. R. Johnson, W. McCutcheon, J. Moroney, W. L. Cabell, Robert Kleburg and Murchison & Coleman, as more particularly shown below.

Through losses of papers and destruction of records by the burning of the Dallas county court-house in 1890, the records of
136 the proceedings in these cases is more or less incomplete.

The following is a statement of the above-mentioned judgments, and proceedings therein and in reference to the same, so far as can be gathered from information accessible at the date of this agreement, omitting matters deemed immaterial:

No. 893. W. B. Nason, dated April 11, 1882, $124.40, costs $5.85, county court, Dallas county.

Execution issued April 24, 1882, returned April 27, 1882, "Road and property in hands of receiver."

Alias execution issued August 26, 1886, levied August 27, 1886, on property described in Powell deed.

Execution lost.

By "Powell deed" in this agreement is meant the sheriff's deed to "E. M. Powell and associates" shown below.

No. 1572, W. A. Rodgers, dated November 26, 1881, $869.04, costs $6.25 county court Dallas county.

Execution issued July 26, 1882.

Alias execution issued August 26, 1886, levied August — on property as described in Powell deed.

Original execution lost.

Abstract of judgment properly filed, recorded and indexed Dallas county, November 26, 1881, 10 a. m. vol. 1, p. 107.

No. 1616, W. A. Nason, date March 31, 1882, $1020, costs $6.65, county court Dallas county.

Execution issued April 24, 1882, returned April 27, 1882, "Road and property in hands of receiver." Alias execution issued August 26, 1886, levied August 28, 1886, on property as described in Powell deed.

Original execution lost.

Pluries execution issued to Kaufman county January 31, 1889, no return.

Judgment properly abstracted Kaufman county, October 11, 1883, vol. A, p. 85.

No. 1676, Thos. J. Elam, date October 6, 1882, $1000, costs $——, county court Dallas county, $250 of judgment remitted.

137 First execution issued August 26, 1886, levied August 28, 1886, on property described in Powell deed.

Execution lost.

No. 1244, John Shawyer, *et al.*, date December 1, 1881, $50, costs $——, county court Dallas county.

First execution issued August 28, 1886.

No return on execution docket.

Execution lost.

January 18, 1881, death of plaintiff John Shawyer suggested, and Jno. A. Shawyer, G. H. Shawyer, S. R. Goodman, A. S. Goddman, M. T. Shawyer, Dick Matthews and Nannie Matthews made parties plaintiffs.

No. ——, Gaston & Thomas, a firm composed of W. H. Gaston and W. H. Thomas, date January 18, 1882, $524.16, costs $——, county court Dallas county.

Transferred by plaintiffs to Adams and Leonard March 31, 1882, and by Adams & Leonard to D. R. Sortwell same date.

Execution issued March 10, 1882, returned by order of Adams & Leonard June 10, 1882.

Alias execution issued August 26, 1886, returned not executed.

Pluries execution issued September 3, 1886, returned levied on property as described in Powell deed, and sale duly advertised.

Execution lost.

No. 1701, J. E. Gill, date May 29, 1883, $391.40, costs $——, county court Dallas county.

First execution issued August 27, 1886, levied August 27, 1886, on property as described in Powell deed.

Execution lost.

No. 1575, Isaac Roberts, date March 28, 1882, $446.90, costs $——, county court Dallas county.

No execution shown by execution docket.

No. 2905, J. R. Johnson, date December 10, 1882, $74, costs $4.20, J. P. Ct. Pr. No. 1, Dallas county.

Abstract of judgment properly recorded and indexed, Dallas county, April 12, 1883, 9 a. m. vol. 1, p. 170.

138 No. 1926, W. McCutcheon, date November 11, 1881, $103.49, costs $6.80 J. P. Ct. Pr. No. 1, Dallas county.

Transferred to C. M. Wheat June 25, 1883.

Abstract of judgment properly recorded and indexed Dallas county, November 12, 1881, 9.30 a. m. vol. — p. —.

No. 2075, J. Moroney, date November 28, 1881, $165.80, costs $3.55 J. P. court, precinct No. 1, Dallas county.

Abstract of judgment properly recorded and indexed Dallas county, November 29, 1881, 4 p. m. vol. 1, p. 112.

No. 4558, W. L. Cabell, date November 3, 1882, $2439, costs $5.85, district court Dallas county.

First execution issued August 26, 1886, returned levied August 27, 1886 on property as described in Powell deed. Return recites sale and application of proceeds to prior writs,—returned *nulla bona*.

Execution lost.

Abstract of judgment properly recorded and indexed in Dallas county, November 4, 1881, 11½ a. m. vol. 1, p. 153.

No. 4302, Robert Kleburg, date January 6, 1882, $1439.80, costs $14.40 district court Dallas county.

Execution issued August 26, 1886.

No return on execution docket. Receipt from A. S. Lathrop for execution, dated December 11, 1886, on file.

Execution lost.

Abstract of judgment properly recorded and indexed Dallas county, January 13, 1882, 2 p. m. vol. 1, p. 122.

No. 886, Murchison & Coleman, a firm composed of T. H. Murchison and N. P. Coleman, dated January 18, 1882, $374.50, costs $——, county court of Dallas county, purports to foreclose lien of an attachment levied December 5, 1881, (but after appointment of Simpson as receiver in the Snow suit) on the 25-acre tract described in the Powell deed.

Judgment transferred to Adams & Leonard, (without date) and by Adams and Leonard to D. R. Sortwell, March 31, 1882.

Order of sale issued March 10, 1882, returned not executed

139 by order of Adams & Leonard, June 1, 1882.

Alias order of sale issued August 26, 1886, levied August 28, 1886, on 25-acre tract, and duly advertised.

Execution lost.

The judgment does not show when the attachment was levied.

The following is a substantial copy of the sheriff's deed dated

October 7, 1886, duly acknowledged October 7, 1886, recorded October 13, 1886, vol. 77, p. 622, Dallas county deed records:—

Sheriff's Deed to E. M. Powell.

THE STATE OF TEXAS, }
County of Dallas. }

" Texas Trunk R'y Co., by sheriff, }
to } Deed.
E. M. Powell *et al.* }

Whereas certain executions and an order of sale, directed to any sheriff or constable of Dallas county, one issued upon judgment in favor of W. A. Nason, against Texas Trunk Railroad Company in county court of Dallas county, Texas, for one thousand and twenty dollars, and costs, rendered on the 26th day of August, 1882, another issued in favor of W. A. Rodgers against said railroad company in county court of said county, rendered the 26th day of November, 1881, for eight hundred and sixty-nine dollars and 4/100, and costs, another in favor of Robert Kleburg against said railroad company, issued from the district court of Dallas county, aforesaid, upon judgment of 6th day of January 1882, for fourteen hundred and thirty-nine and 80/100 dollars and costs, another in favor of J. Moroney, issued upon judgment in justice court of Dallas county, precinct No. 1, for one hundred and sixty-five and 80/100 dollars, rendered November 28, 1881, against said railroad company, and sundry other executions against said railroad company, were placed in my hands as sheriff of Dallas county on the 27th day of August 1886, to do execution thereof. And also an order of sale issued from the county court of Dallas county, upon judgment and fo-e-closure of attachment lien in favor of Murchison & Coleman, for three hundred and seventy-four dollars and 50/100 and costs, rendered on the 18th of January 1882, against Texas Trunk
Railroad Company, commanding the sale of part of lot No. 5,
140 in John Grigsby league &c., and whereas on the 28th day of
August, 1886, I, W. H. W. Smith, as sheriff, did levy the said executions and order of sale as follows, the order of sale upon the tract of land known and described as follows, to wit: A certain tract of land in the county of Dallas, and State of Texas, being a part of the original John Grigsby league, about two miles east of the court-house in the city of Dallas, same being a part of lot No. 5, in the division of said league; beginning at the east corner of Jacob Bopps, on the southwest line of said lot No. 5; thence N. 45 E. 650 feet to corner post; thence south 45 E. 1680 feet to a corner post; thence south 45 W. 650 feet to said boundary line; thence north 45 west 1680 feet on the said boundary line to the beginning containing 25 acres more or less—and said several executions so placed in my hands did levy on the said tract of land above described, and also upon the following property, to wit: The entire road-bed, track, rail-road, depots, depot grounds, offices, and appurtenances, from the

city of Dallas in the county of Dallas to the town of Kaufman in Kaufman county, of the Texas Trunk Railroad Company, as constructed in 1882. Also upon the right of way, franchises, land grant, and all chartered rights and privileges of said company as existing in 1882. And also upon the following tract of land, being, lying and situate in the county of Dallas, and State of Texas, and described as follows: Beginning at a bois d'arc post with railroad spike driven into it, at the southeast corner of said Mays land where it joins the southwest corner of Gallaher's land, then in a northwesterly direction along the boundary line between said Mays and Gallaher, 600 feet to a stake. Thence at right angles to said boundary line of said Mays and Gallaher 919 feet to a stake on the west boundary of said Mays' land 600 feet to a stake on the boundary line between said Mays' and J. J. Good's line. Thence at right angles to said east line in an easterly direction along the boundary line between said Mays and Good to the place of beginning, containing 11 & 92/100 acres—all levied on as the property of the Texas Trunk Railroad Company. And whereas after giving notice of the time and place and terms of sale, by posting written notices signed by me as sheriff of Dallas county, at
141 three public places in the county of Dallas, one of which was the court-house door of said county, I, as sheriff, aforesaid, on Tuesday the 5th day of October 1886, between the hours of ten a. m. and four in the afternoon of said day at the court-house door in the county of Dallas, did expose said property so levied upon, to sale at public outcry to the highest bidder for cash, and at such sale E. M. Powell and associates having bid for the aforesaid 25-acre lot the sum of six hundred dollars, and for the said railroad, road-bed, depots, depot grounds, offices and appurtenances, and the franchises, land grant, right of way, chartered powers and privileges of Texas Trunk Railroad Company, having bid eighteen hundred dollars, and for the tract of land of eleven and 92/100 acres, having bid six hundred dollars, and these being the highest and best bids therefor, the same was knocked down to the said E. M. Powell and associates as purchasers, for the aggregate sum of three thousand dollars. Now therefore in consideration of the premises and the payment by them of three thousand dollars, the receipt of which is hereby acknowledged, I, as sheriff, as aforesaid, have and by these presents do hereby grant, bargain sell and convey to the said E. M. Powell and associates all the right title and interest of the Texas Railroad Company in and to the entire road-bed, track, railroad, depots, depot grounds, offices and appurtenances, from the city of Dallas in the county of Dallas to the town of Kaufman in Kaufman county, as constructed in 1882. Also the right of way franchises, and all chartered privileges, and powers, of said Texas Trunk Railroad Company, as existing in 1882, also the following real estate to wit: a certain tract of land in the county of Dallas and State of Texas, being a part of the original John Grigsby league, about two miles east of the court-house, same being a part of lot No. 5, in the division of said league; beginning at the east corner of Jacob Bopps, on the southwest line of said lot No. 5; thence north 45 east 650

feet to a corner post; thence south 45 east 1680 feet to a corner post; thence south 45 west 650 feet to said boundary line; thence north 45 west 1680 feet on the said boundary line to the beginning, containing 25 acres more or less—also a tract of land situated in the aforesaid county of Dallas, described
142 as follows: Part of the Lagow league, beginning at a bois d'arc post with railroad spike driven in it, at the southeast corner of said Mays' land, where it joins the southwest corner of Gallaher's land. Then in a northwesterly direction along the boundary line between said Mays and Gallaher 600 feet to a stake. Thence at right angles to said boundary line of said Mays and Gallaher, 919 feet to a stake on the west boundary line of said Mays' land; thence at right angles to said last-named line in a southeasterly direction along the west boundary line of said Mays' land 600 feet to a stake on the boundary line between said Mays' and J. J. Good's line. Thence at right angles to said east line in an eastwardly direction along the boundary line between said Mays and Good to the place of beginning, containing eleven and 92/100 acres.

To have and to hold the above-described and hereby granted property to them the said E. M. Powell and associates and to their heirs and assigns forever, as fully and absolutely as I as sheriff as aforesaid can convey by virtue of the said several executions and order of sale in my hands levied thereon as aforesaid.

In testimony whereof I have hereunto set my hand this 7th day of October, 1886.

W. H. W. SMITH,
Sheriff of Dallas County,
By W. M. MOON, *Deputy.*"

It is agreed that the execution- referred to in the foregoing deed were issued and levied and sales advertised and made as therein recited and the executions were returned in due form, but the validity of said proceedings is not admitted by this agreement.

ATKINS, Receiver,
vs.
CAMPBELL ET AL.

XIII.

On January 13, 1894, Geo. T. Atkins, suing as receiver, appointed in suit No. 193 equity, Central Trust Company of New York *vs.* Texas Trunk Railroad Company, filed his original bill in equity in the United States circuit court at Dallas against John S. Hetherington, F. R. Rowley, E. M. Powell, C. T. Campbell, M. J. O'Brien and Geo. H. Tilley, the style of the suit being No. 275 equity,
143 George T. Atkins receiver *vs.* C. T. Campbell *et al.* In some of the papers the suit is styled George T. Atkins receiver *vs.* John S. Hetherington, *et al.*

Complainant set forth the alleged history of the company at great length including the judgments, suits and proceedings with which

defendants were connected and prayed for a cancellation of the sheriff's deed to E. M. Powell and associates, heretofore mentioned. Among other things complainant alleged that all the property embraced in the Powell deed was embraced in the International Trust Company mortgage and foreclosure sale; that through the subsequent proceedings heretofore mentioned all said property became vested in the reorganizations of the railroad company, and in the company that executed the Central Trust Company mortgage; that the judgments in favor of Nason and others under which the Powell sale was made, were all monied judgments, without lien against the first company; that some of said judgments had been paid and the others had become dormant before the Powell sale; that the Powell sale was void, because prior thereto the first company had become dissolved as a corporation through the International Trust Company sale; that none of said judgments had been revived against the trustees of the sold-out company; that said Powell sale was fraudulent in fact; that the consideration was grossly inadequate; that the executions were issued and the sale was made without the authority of the plaintiffs in said judgments; that the amount bid was not in fact paid by Powell and associates. Complainant prayed for a cancellation of the Powell deed for the benefit of those represented by complainant as creditors, stockholders or otherwise. After the case came to issue on the pleadings there was a reference to R. E. Cowart, special commissioner, to take testimony, and upon the filing of his report, a further reference to J. M. McCormick Esq., special master, to report his conclusions of fact and law. Upon filing of the special master's report exceptions were filed by the complainant and defendants.

Final Decree.

On July 16, 1895, a final decree was rendered substantially as follows:

This day this cause came regularly on for final hearing upon the evidence duly taken and upon the report of the special mas-
144 ter in chancery to whom it was heretofore referred upon motion of defendants, and upon the exceptions filed by the defendants, John S. Hetherington, F. R. Rowley, E. M. Powell, C. T. Campbell, M. J. O'Brien and George H. Tilley to the report of said special master in chancery; and all parties appearing by their respective solicitors, and the cause being submitted as aforesaid, and after hearing the argument of the solicitors and considering the evidence and the proceedings.

It is now ordered and decreed:

1. That the deed made by the sheriff of Dallas county by his deputy, dated the 7th day of October, 1886, to defendants, as set forth in the bill, and executions and levies thereof, and the sale in pursuance thereof, and under which said deed was made, as appear from the proceedings herein, are each and all inferior to, and constitute a cloud upon, the title of the complainant herein to the property therein mentioned and sought to be conveyed, and particularly described as follows, to wit:

All and singular the corporate rights, franchises and privileges of the Texas Trunk Railroad Company, and its line of railroad constructed from a point in the city of Dallas; thence through the counties of Dallas and Kaufman to Cedar station in Kaufman county, Texas, including, and together with, the right of way, roadbed superstructures, iron, ties, splices, chains, belts, nuts, spikes, lands, depot grounds, station-houses and depots, viaducts, bridges, lumber, materials, property purchased for the construction and equipment of said railroad, locomotives, cars, machinery, rolling stock, and all other franchises and rights of said railroad company, with the machine shops, tools, implements, and all appendages and appurtenances of said railroad and property of said railroad company, and property acquired and to be acquired and used for and appertaining to the operation of said railroad, and all the property and rights of every character whatsoever of said railroad company, including all that tract of land situated in said county of Dallas, State of Texas, and being a part of the original John Grigsby league about two miles east of the court-house in the city of Dallas, the same being a part of lot five (5) of the division of said league; beginning at the east corner of Jacob Bopp on the southwest line of said lot No. 5;
145 thence north 45 east 650 feet to a corner post; thence south 45 east 1680 feet to a corner post; thence south 45 west 650 feet — said boundary line; thence north 45 west 1680 feet on said boundary line to the beginning, containing 25 acres more or less, together with all and singular the right, members, hereditaments and appurtenances to the same belonging or in anywise incident or appertaining; and also including the tract of land situated in the aforesaid county of Dallas, State of Texas, described as follows: Part of the Lagow league, beginning at the bois d'arc port with a railroad spike driven in it, at the southeast corner of said Mays' land where he joins the S. W. corner of Gallaher's land; thence in a northwesterly direction along the boundary line between said Mays' and said Gallaher's land, 600 feet to a stake; thence at right angles to said boundary line of said Mays and Gallaher 919 feet to a stake on the west boundary line of said Mays' land; and thence at right angles to said last-named line in a southeasterly direction along the west boundary of said Mays' land 600 feet to a stake on boundary line between said Mays' and John J. Good's land; thence at right angles to said west line in an easterly direction along the boundary line between said Mays and Good to the place of beginning, containing 11-92/100 acres, together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining; the said tract being a tract of land heretofore convey-- to the Texas Trunk Railroad Company by Samuel R. Mats and Amanda C. Mays by deed dated February 3, 1881, and recorded in Bock No. 48, page 586, of the records of deeds, Dallas county, Texas.

The decree makes provisions for the payment of costs etc., which are taxed against defendants. No appeal was taken from this decree.

It is further agreed that subsequent to the execution and delivery

of the deed above mentioned from A. T. Watts, special master commissioner, *et al.*, to Edward H. Pardee, and prior to the institution of this suit, said E. M. Powell and associates executed and delivered to Edward H. Pardee special warranty deeds in due form of law
146 purporting to convey to the said Edward H. Pardee all right, title and interest that the said E. M. Powell and associates acquired by the sale made by W. H. W. Smith, sheriff of Dallas county, Texas, by W. M. Moon, deputy, to E. M. Powell and associates, hereinbefore set forth.

Title of Hintington and Pardee.

The title of Edward H. Pardee, as shown by this agreement, and as may be shown on the trial, is held for the benefit of himself and his codefendant, C. P. Huntington.

W. F. THOMPSON
vs.
T. T. R. R. Co.

XIV.

On November 4, 1881, W. F. Thompson brought an action of debt for $3000 in the district court of Dallas county, Texas, against the Texas Trunk Railroad Company, as then organized, and on December 5, 1881, caused an attachment to be levied on the property described in judgment subsequently rendered in said cause, said property being at that time in the hands of Simpson, receiver in the Snow suit hereinbefore mentioned.

The case remained on the docket until March 15, 1887, on which date the following judgment was rendered:

W. F. THOMPSON
vs.
THE TEXAS TRUNK RAILROAD CO. } No. 4333.

FRIDAY, *March* 18, 1887.

The following entry is made as of March 15, 1887:

On this day came on to be heard the above styled and numbered cause, and by order of the court on application and motion only, filed and presented to the court, Charles Vider and John Walston, are made parties plaintiffs herein as assignees of the original plaintiff, W. F. Thompson, and permitted as surviving partners of the firm of Walston, Wells & Vider, to prosecute this suit as owners of the demand herein sued on.

And said cause coming on for trial, the plaintiffs appeared and announced ready, and thereupon John L. Henry, Esq., announced to the court that he did not appear for any of the parties to this suit, but solely as *amicus curiæ*, suggested that the defendant The Texas Trunk *Railway* Company, with its property and franchises, had been sold out upon a decree of court and was not any longer an

existing corporation. No proof was made in support of such
147 suggestion, or offer to make such proof, at that time or thereafter, during the trial of said cause, and no further action or notice taken of such suggestion. Said defendant, The Texas Trunk Railroad Company, appeared by its attorney and counselor, Jas. J. Simpson, and presented to the court its demurrer general and special, to plaintiffs' petition, and certain special exceptions were after argument sustained by the court. Thereupon plaintiffs obtained leave to amend and filed their first amendment, and defendant, by leave of the court, filed its supplemental answer with demurrers general and special to plaintiffs' petition and trial amendment, which was by the court considered and overruled, and defendant excepted. Said cause being at issue on the pleadings, to wit: plaintiffs' petition and trial amendment, and defendant's answer and plea in reconvention; plaintiffs having already announced ready for trial, defendant announced not ready, and presented its application for a continuance, which after being duly considered, was by the court overruled, and defendants excepted. Said cause thus proceeded to trial, and thereupon came a jury of good and lawful men, to wit: G. H. Beauson, foreman, and eleven others, who were duly selected, empaneled and sworn as the law directs; and after hearing the evidence, argument and charge of the court, retired to consider of their verdict, and after due deliberation, returned into open court the following verdict, to wit:

"We, the jury, find for the plaintiff- the sum of three thousand dollars, with interest from the first day of January, 1882, at 8 per cent. per annum until the present date, amount of interest, one thousand two hundred and fifty dollars, and that said sum is a lien upon the property attached herein.

(Signed) H. G. BRAUSON, *Foreman.*"

It is therefore considered by the court that the plaintiffs John Walston and Charles Vidor, surviving partners of the firm of Walston, Wells & Vidor, ought to recover of and from the defendants herein, The Texas Trunk Railroad Company, the sum of forty-two hundred and fifty dollars, as found by the jury in their verdict, and that the same is a lien upon the property hereinafter described and that plaintiff- ought to recover of said defendant all that
148 costs of this suit. And it further appearing from the record and proceedings in this cause that an attachment was sued out herein and levied upon the property hereinafter described, to wit: on the 5th day of December, 1881, and by verdict of the jury as aforesaid, and the record and proceedings herein, that said property is subject to said writ of attachment, and that plaintiffs have an attachment lien upon said property, it is further ordered, adjudged and decreed by the court that said attachment lien upon said property, to wit: the road-bed, track, right of way, chartered rights, franchises and privileges of said defendant The Texas Trunk Railroad Company so owned and to which said defendant was entitled on the 5th day of December, A. D. 1881, be and the same are hereby foreclosed and it is ordered, adjudged and decreed that an order of

sale issue upon this judgment and decree for the sale of said property in the manner provided by law for the sale of the same under execution, and that the sheriff or officer executing said writ, apply the proceeds of said sale to the satisfaction of this judgment, and decree, and all costs of this suit and of said writ or order of sale, and the balance if any remains, he pay over to said defendant, The Texas Trunk Railroad Company. But if the proceeds of said sale be insufficient to pay off this judgment and decree aforesaid and costs, for any balance remaining unpaid, it is ordered that plaintiffs have their execution. It is further ordered that execution issue in favor of the officers of court against each party respectively, for the costs by each in this behalf incurred."

But the validity of said judgment is not admitted by this agreement.

On May 30, 1887, an execution and order of sale was issued on this judgment, and levied June 10, 1887, on the property described in the judgment of foreclosure. On June 28, 1887, at the suit of the Texas Trunk Railroad Company as then organized, the sale of the propert- under said order of sale was enjoined on the ground that the attachment was void, it appearing that it was levied subsequent to the appointment of a receiver in the Snow suit in Kaufman county, heretofore mentioned. This injunction was subsequently dissolved, but on appeal the supreme court, on May 5, 1891, reversed and rendered the judgment, and perpetuated the injunction restraining the sale of the property described in the judgment. (See Texas Trunk *vs.* Lewis, sheriff, 81 Tex., 1.)

Sheriff's Sale to C. C. Bumpas.

On March 9, 1895, an *alias* general execution was issued on the judgment to Dallas county, and levied same day on the
149 Dallas county lands involved in this suit. On April 2, 1895, the lands were sold by the sheriff under this execution to C. C. Bumpas, trustee for J. E. Downes, and associates, for $2350, and sheriff's deed duly executed to the purchaser.

On August 30, 1895, a pluries *general* execution was issued on the judgment to Houston county, and levied on September 6, 1895, on the Houston county lands involved in this suit. On October 1, 1895, the lands were sold by the sheriff under this execution and levy to C. C. Bumpas, trustee for J. E. Downes and associates for $150.00, and sheriff's deed duly executed to purchaser.

BUMPAS
vs.
ELY ET AL.

On May 2, 1895, C. C. Bumpas, suing as trustee for J. E. Downes and associates, brought suit of trespass to try title in district court of Dallas county, Texas, 44th judicial district, for the Dallas county lands involved in this suit, against John Ely, George H. Ely, Daniel R. Sortwell, Malcolm Henderson, James B. Simpson, W. L. Cabell

and D. A. Robinson, who were alleged to be all the living members of the last board of directors of the Texas Trunk Railroad Company as originally incorporated, and who were sued in their capacity as trustees of said original company; and also against said original company; and also against John H. Gaston as the duly appointed, qualified and acting receiver of the Texas Trunk Railroad Company, as it was organized and existed as a railroad corporation under the laws of the State of Texas on and immediately prior to September 14, 1891, and which was alleged to be a railroad corporation being or pretended to be the successor of said original corporation, it being alleged that the charter of said last-mentioned corporation was dissolved on or about September 14, 1891, by a judgment rendered in the suit of the State of Texas *vs.* The Texas Trunk Railroad Company, pending in the district court of Ellis county, wherein said John H. Gaston was appointed receiver, which judgment was affirmed by the supreme court on or about January 15, 1892.

All the defendants were personally cited except John F. Ely, George H. Ely, Daniel R. Sortwell and Malcolm Henderson, nonresidents, who were duly cited by publication. Citation was served on the company through W. L. Cabell as vice-president.

Pending the suit the death of George H. Ely, Daniel R. Sortwell and Malcolm Henderson was suggested, and as to them said suit was dismissed. All the other defendants answered personally on April 5, 1898.

On February 2, 1898, plaintiff filed his first amended original petition which alleged substantially as follows:

150 "(1.) Your petitioner, C. C. Bumpas, hereinafter styled plaintiff, who sues herein as trustee for J. E. Downes and associates, complaining of John F. Ely, James B. Simpson, W. L. Cabell, D. A. Robinson, the Texas Trunk Railroad Company, a railroad corporation which was organized and incorporated under the Revised Statutes of 1879, whose articles of association were filed with the secretary of state of the State of Texas on or about November 6, 1879, with its principal office in Dallas county, Texas, W. L. Cabell being its vice-president and acting president, and D. A. Robinson its secretary, and Malcolm Henderson its treasurer, said corporation being herein sued as originally incorporated, before any sale, real or pretended, of its road-bed, track, franchise and chartered powers and privileges, and before any reorganization of the same, real or pretended, occurred, and also complaining of John H. Gaston, the duly appointed qualified and acting receiver for the Texas Trunk Railroad Company, as it was organized and existed as a railroad corporation under the laws of the State of Texas on and immediately prior to the 14th day of September, 1891, and which was a railroad corporation, being or pretending to be the successor of said corporation first mentioned, the charter of which last-mentioned corporation was forfeited, and said last-mentioned corporation dissolved on or about the 14 day of September, 1891, by a judgment rendered in the suit of The State of Texas *vs.* The Texas Trunk Railroad Company, pending in the district court of Ellis county, Texas, wherein the said John H. Gaston was ap-

pointed, and he is now acting receiver, which judgment was affirmed by the supreme court on or about January 15, 1892; and thereupon your petitioner alleged:

(2.) That plaintiff and defendants Simpson, Cabell, Robinson, and Gaston reside in Dallas county, Texas, and that defendant John F. Ely is a non-resident of the State of Texas.

(3.) Defendants claim and pretend that said first-mentioned Texas Trunk Railroad Company, as originally incorporated, is also dissolved as a corporation, and cannot be sued as such, and plaintiff is not advised, and cannot state whether or not such be the case, but plaintiff alleges that defendants, John F. Ely, James B. Simpson, W. L. Cabell, and D. A. Robinson are all the living members of its last board of directors, and they are here sued in their capacity as trustees of said first-mentioned Texas Trunk Railroad Company, as originally organized and incorporated."

Paragraph 4 of the petition described the lands in Dallas, Kaufman and Houston counties involved in this suit, which lands plaintiff sought to recover of defendants under the usual and
151 proper allegations in a suit of trespass to try title.

The prayer of the petition was as follows:

Wherefore, plaintiff prays that defendants be cited to appear and answer this petition, that the court determine whether or not the said first-mentioned corporation has been dissolved, and thereupon to render such judgment herein as may be proper, and that plaintiff have judgment for the title and the restitution of the above-described premises, and for his damages, costs of suit, and for all such other relief, both general and special, as he may be entitled to either in law or in equity.

On April 7, 1898, the following judgment was rendered in said suit:

C. C. BUMPAS
vs.
JOHN F. ELY ET AL. } No. 14047.

APRIL 7, 1898.

On this day the above entitled and numbered cause coming on for trial, came plaintiff by attorneys and announced ready for trial. And defendants, though duly cited, and having appeared and answered herein, made no further appearance on the call of said case for trial. And it appearing to the cour- that George H. Ely, Daniel R. Sortwell and Malcolm Henderson, original defendants herein are dead, and that they have heretofore been dismissed from this suit, such orders of dismissal are hereby made final. And no jury having been demanded by either party, and the matters of fact as well as of law having been submitted to the court, it is the opinion of the court that the law is for plaintiff. And it appearing to the court that defendant, The Texas Trunk Railroad Company, a railroad corporation as originally incorporated under the general laws of the State of Texas, has been dissolved as a corporation, and that defendants John F. Ely, James B. Simpson, D. A. Robinson and W. L. Cabell, are all the surviving members of its last board of di-

rectors, and that they are sued herein and have answered in their capacity as trustees of said dissolved corporation, and that defendant John H. Gaston is the duly appointed, qualified and acting receiver of the Texas Trunk Railroad Company, as it was organized and existed as a railroad corporation under the general laws of the State of Texas immediately prior to the 14th day of September, 1891, and which was a railroad corporation being the successor of said corporation first above mentioned, the charter of which last-mentioned corporation was forfeited and said last-mentioned corporation dissolved on or about the 14th day of September, 1891, by a judgment rendered in the suit of the State of Texas *vs.* The Texas Trunk Railroad Company, pending in the district court of
152 Ellis county, Texas, wherein John H. Gaston was appointed and he is now acting receiver, which judgment was affirmed on or about January 15th, 1892, by the supreme court of the State of Texas, and it further appearing to the court that plaintiff is the legal and equitable owner of the lands and premises described in plaintiff's first amended original petition filed herein on the second -ay of February, 1898, and hereinafter fully described.

It is therefore ordered, adjudged and decreed by the court that said defendant corporation, The Texas Trunk Railroad Company, as originall- incorporated, be and it is hereby declared dissolved as a corporation; that defendants John F. Ely, James B. Simpson, W. L. Cabell, and D. A. Robinson, are all the surviving members of its board of directors, and trustees of said dissolved corporation; that plaintiff, C. C. Bumpas, who sues herein as trustee of J. E. Downes and associates, do have and recover of said defendants, John F. Ely, James B. Simpson, D. A. Robinson and W. L. Cabell, as surviving directors and trustees of the Texas Trunk Railroad Company, as originally incorporated, before any sale of its road-bed, track, franchises and chartered powers and privileges, and before any reorganization of the same occurred, and of John H. Gaston, as receiver of the Texas Trunk Railroad Company, as afterwards organized as aforesaid, the title and possession of all the lands and premises sued for herein, to wit:

(Here follows description of the lands in Dallas, Kaufman and Houston counties involved in this suit.)

It is further ordered that plaintiff recover of defendants all costs in this behalf incurred, that plaintiff have his writ of possession, and that the officers of court do have and recover of each party respectively the costs by them respectively incurred, for all of which let execution issue.

On December 28, 1897, James B. Simpson, D. A. Robinson, John F. Ely and W. L. Cabell, as directors and trustees of the Texas Trunk Railroad Company, executed the following deed:

Deeds—Simpson et al. to Bumpas.

THE STATE OF TEXAS, }
County of Dallas. }

Know all men by these presents: that we, James B. Simpson, W. L. Cabell, D. A. Robinson, and John F. Ely, the surviving directors and trustees of the Texas Trunk Railroad Company a railroad corporation which was organized and incorporated under the Revised Statutes of 1879, and whose articles of association were filed with the secretary of state of the State of Texas on or about the 6th day of November, 1879, in consideration of the sum of one
153 dollar and other valuable considerations, to us in hand paid, by C. C. Bumpas, trustee, for J. E. Downes and associates, the receipt of which is hereby acknowledged, acting for ourselves, as surviving directors and trustees, and on behalf of said corporation, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said C. C. Bumpas, trustee for J. E. Downes and associates, all those tracts of land lying and being situated in Dallas county, State of Texas, and particularly described as follows, to wit:

(Here follows description of Dallas county lands involved in this suit, concluding as follows: "Also all other lands in Dallas county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company.")

Together with all and singular the rights, members, hereditaments, and appurtenances to the same belonging or in anywise incident or appertaining.

To have and to hold, all and singular, the said premises, unto him, the said C. C. Bumpas, trustee for J. W. Downes and associates, his heirs, successors and assigns forever.

Witness our hands this 28th day of December, 1897.

(Signed) JAMES B. SIMPSON,
JOHN F. ELY,
D. A. ROBINSON,
W. L. CABELL,
Directors and Trustees of the Texas Trunk Railroad Company.

On the same day deeds were executed in same form by same grantors to same grantee, conveying the Kaufman and Houston county lands involved in this suit, and also conveying generally all other lands in Houston and Kaufman counties, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company. All said deeds were dated December 28, 1897, and acknowledged by Ely same date, and by Simpson, Robinson and Cabell January 23, 1898.

Trustees of Original Company.

At the date of said deeds from Ely *et al.* to Bumpas, trustee etc., and at the date of the filing of the amended petition in said suit of Bumpas, trustee etc., *vs.* Ely *et al.*, and at the date of the judgment in said suit, John F. Ely, James B. Simpson, D. A. Robinson and W. L. Cabell were all the living and surviving members of the last board of directors of said Texas Trunk Railroad Company as originally incorporated, and as said board existed at the time of the sale under the decree in favor of the International Trust
154 Company, the confirmation of such sale, and the conveyance to the purchasers at such sale, and no new directors or trustees of said original sold-out company have since been appointed. At the date of sale and confirmation under the International Trust Company mortgage the directors we-e the same named as such in the charter.

On January 16, 1896, C. C. Bumpas, trustee for J. E. Downes and associates, executed to Wm. G. Mowry, A. F. Hardie and A. D. Aldridge, trustees for J. E. Downes and associates, a deed substantially as follows:

Bumpas, Trustee, to Aldridge et al.

THE STATE OF TEXAS, }
County of Dallas. }

Know all men by these presents: that I, C. C. Bumpas, trustee for J. E. Downes and associates, of Dallas county, Texas, in consideration of one dollar and other valuable considerations to me in hand paid by Wm. G. Mowry, A. F. Hardie and A. D. Aldridge, trustees for J. E. Fownes and associates, the receipt whereof is hereby acknowledged, have granted, bargained, sold and conveyed, and by these presents do grant, bargain, sell and convey unto the said Wm. G. Mowry, A. F. Hardie and A. D. Aldridge, trustees for J. E. Downes and associates, all those certain lands and premises described as follows:

(Here follows description of Dallas county lands involved in this suit, and concluding as follows: "Also all other lands in Dallas county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company.")

Together with, all and singular, the rights, members, her-ditaments and appurtenances to the same belonging or in anywise incident or appertaining. To have and to hold, all and singular, the said premises, ubto them, the said Wm. G. Mowry, A. F. Hardie and A. D. Aldridge, trustees for J. E. Downes and associates, their successors and assigns forever. This deed is made without warranty express or implied.

The said J. E. Downes and associates are creditors of the Texas Trunk Railroad Company, as variously organized, and their privies and assigns, who are beneficially interested in this conveyance, and who are represented by the law firm of Dickson & Moroney,

composed of J. M. Dickson and W. J. Moroney, of Dallas, Texas, who are authorized to direct said trustees in the management of their said trust, and in the sale, conveyance, distribution or partition of the propert*t* hereby conveyed, or any part thereof, and in the recovery, by suit or otherwise, of any of said property that may be held adversely, or to which any person or persons may assert adverse claim, or in the compromise of any adverse claim, and said trustees shall not be liable to said beneficiaries for
155 anything they may do under the direction of said firm of Dickson & Moroney; nor are said trustees authorized to make any conveyance of said property, or otherwise affect its title, without the consent in writing of said firm of Dickson & Moroney, but shall make such conveyances, without warranty, or such compromise or compromises as said Dickson & Moroney shall in writing direct; it being the purpose however, of this deed to vest the full legal title to said property in said trustees, who are authorized to act in their own names alone, as trustees, subject to the advice and direction of said firm of Dickson & Moroney, as hereinbefore stated; and either member of said firm may act for the firm in any matter or matters concerning or arising out of this conveyance or the property hereby conveyed. In case of death, resignation or refusal to act of any of said trustees, the remaining trustee or trustees shall become vested with all the rights, powers and title hereby vested in all said trustees, and said Dickson & Moroney shall have the power, by instrument in writing, to appoint a substitute trustee or trustees to fill the vacancy or vacancies thus created, and such substitute trustee or trustees shall thereupon succeed to all the rights, powers and title of the original trustee or trustees. Any deed or other instrument in writing, executed by said tr*i*stees or any of them, with the w*i*rtten direction and consent of said Dickson & Moroney, shall be *prima facie* evidence of its validity and of the truth of all the facts therein recited. This deed is executed by the authority and direction of said J. E. Downes and associates.

Witness my hand this 16th day of January, 1896.

(Signed) C. C. BUMPAS,
Trustee for J. E. Downes and Associates.

Said deed was dated January 16, 1896, and duly acknowledged January 18, 1896.

By deeds dated and acknowledged February 4, 1898, in the same general form as the deed last mentioned, C. C. Bumpas, trustee for J. E. Downes and associates, conveyed to Wm. G. Mowry, A. F. Hardie and A. D. Aldridge, trustees for J. E. Downes and associates, the Kaufman and Houston county lands involved in this suit, and also co*b*veyed all other lands in Kaufman and Houston counties deeded to or formerly owned by the Texas Trunk Railroad Company.

It is not admitted by -his agreement that the above-mentioned conveyances from James B. Simpson, D. A. Robinson, John F. Ely and W. L. Cabell, as directors and trustees etc., to C. C. Bumpas, trustee, etc., and from C. C. Bumpas, trustee, etc., to W. G. Mowry,

A. F. Hardie and A. D. Aldridge, trustees, etc., were made or that said deeds were delivered on the dates which they bear; nor is the validity or legal effect of said deeds or either of them or
156 of the judgment above mentioned in the case entitled W. F. Thompson *v.* Texas Trunk Railroad Company, and the case of C. C. Bumpas, trustee, etc., against John F. Ely *et al.* admitted by this agreement; nor is the validity or legal effect of the execution sale above mentioned to C. C. Bumpas, trustee etc., admitted by this agreement.

(Here ends the agreement referred to in the opening paragraph of this statement of facts.)

Agreement as to Certain Debts.

XV.

It was also agreed that prior to 1895 the judgment in No. 4333, W. F. Thompson *vs.* The Texas Trunk Railroad Company, mentioned in said original agreement of date December 9th, 1898, was duly transferred to J. E. Downes; also that

On June 29th, 1891, the Southern Distilling Company recovered a judgment in the justice court of precinct No. 1, Dallas county, Texas, against the Texas Trunk Railroad Company for $204.75. In 1893 said judgment was duly transferred to the Southwestern Manufacturing Company; also that

On September 5th, 1891, A. D. Aldridge & Company held a valid claim of indebtedness against the Texas Trunk Railroad Company, as then organized, for $197.00, said account or claim being then due. The Mosher Manufacturing Company held a like claim against said company, due July 21st, 1891, for $74.45. Wm. G. Mowry held a like claim against said company for $3000, due January 1st, 1892; said Mowry, A. D. Aldridge & Company and Mosher Manufacturing Company each filed interventions on said respective claims in the suit of The State of Texas *vs.* Texas Trunk Railroad Company, in the district court of Ellis county, referred to in said original agreement, and each and all of said claims were approved by said court.

Plaintiffs also introdyced the following agreement:

Agreement as to Judge Pardee.

"It is agreed by and between the parties to this suit that Jaudge Pardee was beyond the territorial limits of the northern district of Texas and of the fifth circuit when he made the order appointing Charles Dillingham as receiver, as set forth in the agreement in this cause, but the parties, complainant and defendant in said bill, before the same was presented to said judge, agreed in writing that the application thereby presented for the appointment of such receiver 'may be heard before said judge in chambers at any place within or withour his circuit, and without further notice,' and said agreement was before said judge at the time such order of appoint-

ment was made. This agreement and admission is made
157 for the purpose of this case only, and both parties reserve all objections to the admissibility of any evidence as to where such judge was when said order was made but of such evidence is held admissible, this shall be sufficient proof of such facts."

John T. Witt's Report.

By agreement of the parties plaintiff next introduced in evidence a report of John T. Witt, surveyor, on the character, location and value of the Kaufman county lands involved in this suit. This report showed that these lands, other than town lots, were scattered in different parts of Kaufman county, most of them not being near the railroad; that they were in the main unimproved timbered lands; that the town lots in Crandall, a small town, were on both sides of the railroad right of way, 140 feet wide; said right of way itself being separated from the town lots by an avenue on each side 50 feet wide; that the town lots in Kemp, also a small town, were similarly situated with reference to the railroad and its right of way.

That all of the Kaufman county lands involved in this suit are of the estimated value of $4187.50.

It was admitted that the southeastern terminus of the Texas Trunk railroad is now at Cedar station in Kaufman county, and said railroad does not run anywhere near the Houston county lands involved in this suit.

Testimony of W. M. Johnson.

W. M. Johnson, being sworn, as a witness for plaintiff-, testified as follows:

I am a civil engineer and surveyor; am 66 years old; have resided in Dallas 26 years. I made the survey of the Texas Trunk Railroad grounds in Dallas in 1891, and I surveyed the railroad down to Cedar station for the State in the suit to forfeit the charter of the railroad company. I made a survey of the tract of land bought from Hughes and Slaughter in the city of Dallas, and of the tract bought from Mays in the Lagow league on Sept. 22d, 1891, and another survey of both of these tracts on June 4th, 1895. The Texas Trunk railroad terminates at Cedar station, in Kaufman county, about 54 miles from Dallas. It has never been extended beyond Cedar station. I know to what extent the Texas Trunk Railroad Company used for railroad purposes the 25-acre tract bought from Hughes and Slaughter. They had what is called the main track running through the 25 acres near its west boundary line. The center of this track is 25 feet from the west boundary line at the south corner, and 48 feet at the north corner. The track is 1690 feet long. 12 feet east of the main track at the north
158 end of the land they had a parallel siding 434 feet long. They also had a round track 510 feet long, upon which they run their empties.

No. 376 Parlin & Orendorff 6/59

W. E. Hughes and C. C. Slaughter to Texas Trunk R.R. Co. 25 Acres.

Surveyed by W. M. Johnson C.E. on Sept 22d 1894, and on June 4th 1895.

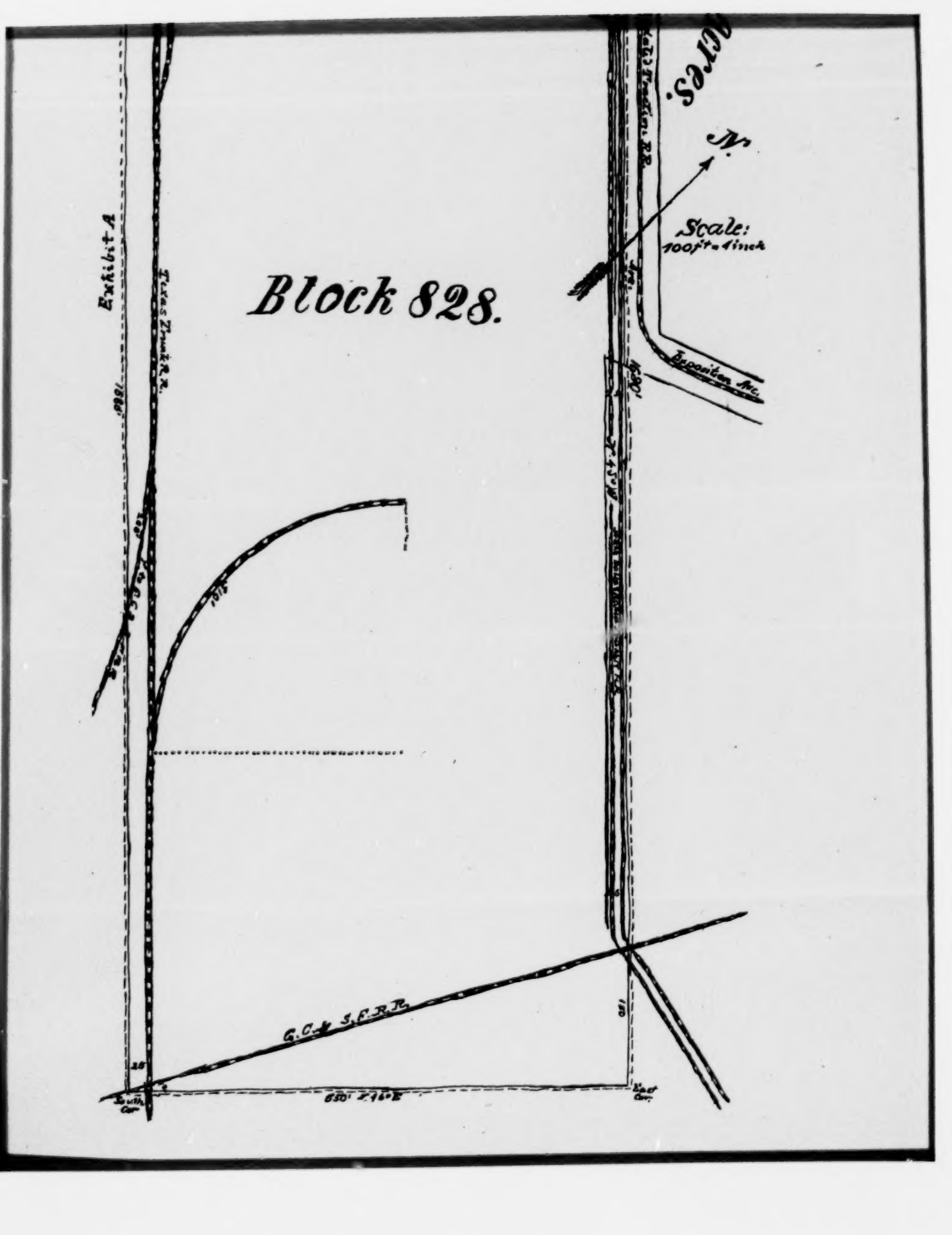


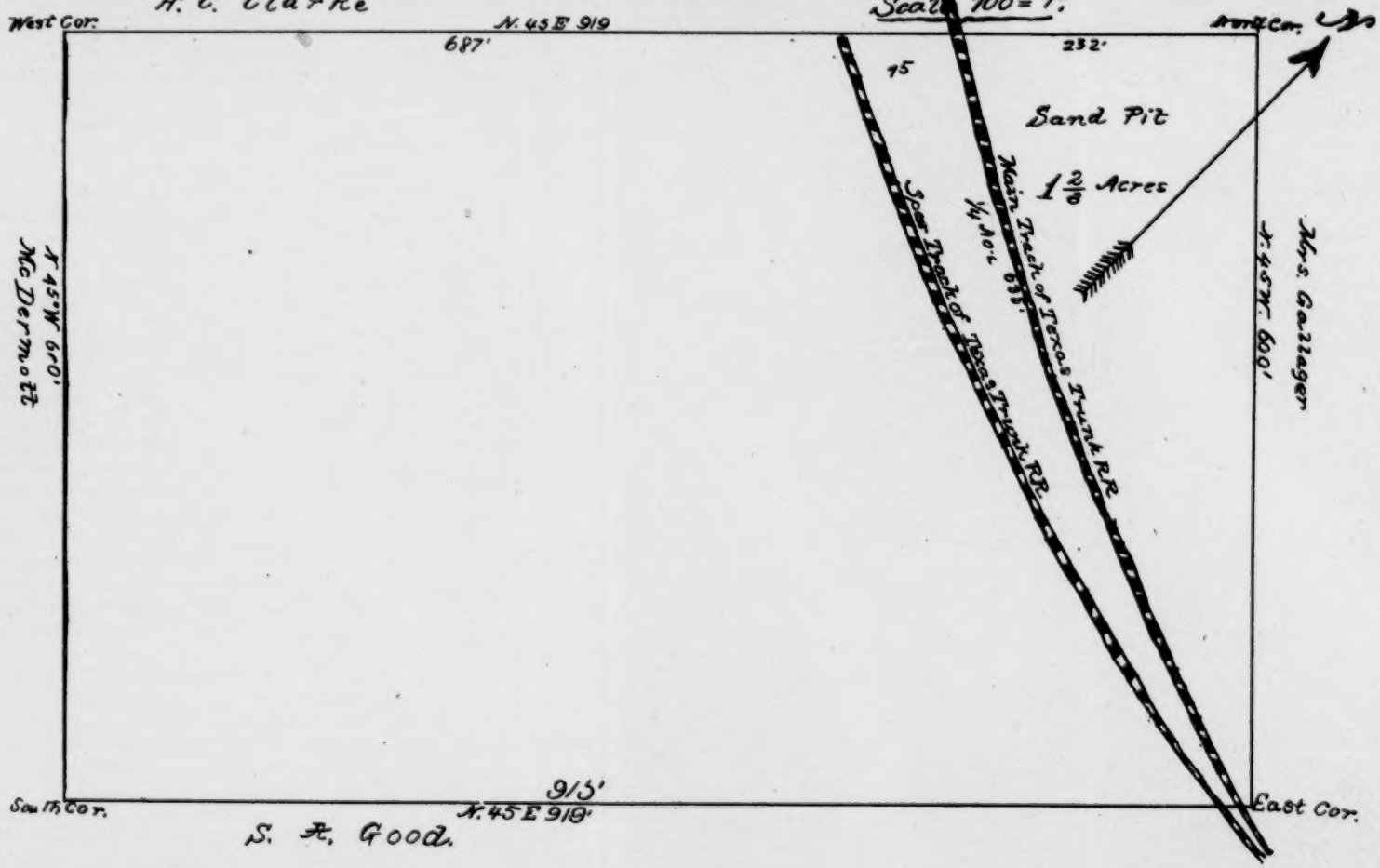
Exhibit A
Block 828.
Texas Trunk R.R.
Scale:
100 ft = 1 inch
N.
Exposition Ave.
G. C. & S. F. R. R.
650' N. 16° E.
South Cor.
West Cor.

Exhibit B

Sam Mays to Texas Trunk R.R. Co 11 95/100 Ars

Surveyed by W. M. Johnson C.E. on Sept 22nd 1891 and on Jan 4th 1895.
H. C. Clarke

Scale 100' = 1"



S. A. Good.

No 376 Pardee Atkinge } p. 160

(The witness is here shown the maps of which the following are substantial copies, marked Exhibit A and Exhibit C, respectively, said maps being introduced in evidence.)

(Here follow maps marked pp. 159 & 160.)

161 *Testimony of W. M. Johnson Continued.*

I made these maps from actual surveys of the land. They correctly show the location of the boundaries of the 25 acres, the location of the main tract, parallel sidings and round tract, also where the Santa Fe runs through the tract, and where the Santa Fe once had a switch, and also where there was once located a car shed, office and tank used by the Texas Trunk Railroad Company. Also the correct location of Commerce street and Exposition avenue, and the correct location of the tracks of the Rapid Transit street railway and of the Consolidated Traction street railway. I am not certain whether this map was made from the survey of September 22, 1891, or the subsequent survey of June 4, 1895. Leaving out of consideration for the present the round track or Y the railroad never had any improvements east of where they are shown on this map. 75 feet from the west line at the north end and 35 feet from the west line at the south end would include all of the railroad improvements that were ever on the land at any time except the Y, allowing 10 feet east of the center of the track. I do not know when the Y was built. I found it there in 1891 as shown in the map. I do not know when the Santa Fe switch was put in. The Texas Trunk's trains used to run to the Santa Fe depot downtown, and when that was done they put that switch in as shown on the map. The balance of the land has been vacant and unoccupied since 1880. It has not been used for any purpose except semi-occasionally for circuses. It has never been fenced. The 510 feet track shown on the map is not there now. It was removed while Dillingham was receiver. The Santa Fe track has also been removed. When they stopped running to the Santa Fe depot downtown they had no use for it and took it up. There are no buildings on the land now. They were removed when Dillingham was receiver. There is no railroad propert- on the 25 acres now except the main tract and parallel siding. There is no trace of anything else. That 25-acre tract is not used as a terminal now. Since the road went into the hands of Dillingham, receiver, they went south of town and swung a connection from the Texas Trunk railroad to the H. & T. C. railroad. The Texas Trunk Railroad Company once had on this tract a little box ticket office about 12 feet square, without any ceiling, and a car shed about 60 feet long and 25 feet wide without any sides to it; it was just a roof on poles. They also had a water tank holding about 1200 gallons. I cannot say when these buildings were put on the property, but I think it was early in the existence of the railroad. I think the box office which was worth about $25, was hauled there. The car shed was not

worth over $50. The tank $75 to $100, frame and all.
162 There was an old well on the place which was there before they bought the property. It was an abandoned well, and had no curbing on it. The above are all the improvements of a railroad character that were ever on the property. The above is a correct map of 11-92/100 acres in the Lagow league, purchased from Mays. The main track runs through this tract, as shown on the map. In 1895 there was one side track on the west side of the main track, used for a gravel track and sand track. The location of this track is correctly shown on the map. There was never any other switch or siding except this gravel track. This tract of land has never been fenced by the railroad. It was fenced by contigious farms on two sides, the other side has always been vacant. The railroad company has been in the habit of taking sand from this tract. It has never used it for any other purpose. In 1895 they had used about three acres.

(At this point both of said maps were introduced in evidence.)

Testimony of W. M. Johnson.

Cross-examination:

On cross-examination, witness testified, as follows:

I think the map represents the conditions existing in 1891 and 1895. It takes two horns to make a Y but only one horn is shown on the map. I think the other horn was once there. In addition to the two horns the Y needs a tail to get it onto the main track. This Y never had a tail when I saw it. The tail ought to run about 100 feet; that is enough to change the engine and passenger cars; they did not run the entire train on the Y. The Texas Trunk only had one passenger car. Assuming that this Y had a tail 100 feet long, it would bring it to within about 75 feet of the northeast boundary line of the 25 acres. The north end of the Y would reach the main track about 600 feet from the south end. The first I knew of the car shed on the property was in 1891. I was not familiar with the property before 1891. The tank was used to water locomotives and trains. There was wood brought in on the cars and stored there along the track. Ever since I have known the road it has been conducting a wood business. They run wood cars on that side track there and unload them. Fourteen cars could be out there on the saide track. They did not have but one train on the railroad at that time, fourteen cars and the engine. The connecting track with the Santa Fe railroad was there when I made this survey. The Texas Trunk railroad never owned any land in the city of Dallas except this 25 acres.

Here counsel for the defendants asked the witness the following question:

Q. "Assuming that the Texas Trunk railroad should be
163 extended from Dallas, its present terminal, to its southern terminal, Sabine pass, with a branch over from some other

point on its main line to Sabine river, making about 350 miles of railroad in length, and having no other railroad property in Dallas, please state whether this 25-acres tract would be necessary for the railroad for terminals, yards, and other railroad purposes?"

The plaintiff objected to the question and to the answer sought to be elicited from the witness, on the grounds that it was immaterial, and irrelevant, and on the ground that the description in the International Trust Company's mortgage and in the decree foreclosing the mortgage, could not be aided, enlarged, or explained by testimony as to what the railroad company needed, and on the further ground that what the railroad company needed could not be shown by the opinion of the witness. Each of the objections were overruled by the court, and the witness answered as follows:

A. Yes, the company would need that 25 acres or some other 25 acres contiguous. They ought to have 40 acres.

To the overruling of the above objections, and the admission of said testimony, plaintiffs then and there excepted.

Counsel for the defendants then propounded to the witness the following question:

Q. "Considering the locality and situation of the property, is it favorably situated for handling freight in connection with other railroads?"

The plaintiffs objected to the question on the ground of immateriality and irrelevancy, and that the matter could not be shown by the opinion of the witness, and that the description in the International Trust Company's mortgage and the decree of foreclosure could not be aided, enlarged or explained by any such testimony, which objections were overruled by the court, and the witness answered as follows:

A. "I consider that a very convenient point; it is reached by several streets, and it is within reach of the connecting lines of railroads, the Santa Fe, the Central and the T. & P."

To the overruling of said objections and the admission of said testimony plaintiffs then and there excepted.

Counsel for defendants then propounded the following question:

Q. "Take the railroad as it existed in 1888, extending from Dallas to Cedar station about 50 miles, and if it was in a condition to be operated, the average condition of Texas railroads, and was not renting terminals, stations, etc., from other lines, but had its own stations and terminals, and were to have its own stations
164 in Dallas, and had its own shops for attending to its engines, and other properties for the operation of the railroad, state whether *hid* 25-acre tract would be necessary for it, that is, without considering the 12 acres in the Gaston tract?"

The plaintiffs objected to the above question and to the testimony sought to be elicited thereby, on the ground that it was immaterial and irrelevant, and on the further ground, that the description in

the Central Trust Company's mortgage or the decree foreclosing same, could not be aided, enlarged or explained by any such testimony, and on the further ground, that the facts could not be shown by the opinion of the witness.

Each of said objections were overruled by the court, and the witness answered as follows:

A. "Yes, sir, I think they would have needed it. It would have given them conveniences which they would not have had on a narrower or smaller piece of land. There would have been warehouses for different branches of businesses, and machine shops, and turn-outs, and water stations, and depots, and other things, and I think the 25 acres would have been required for legitimate railroad purposes."

To which ruling of the court, and the admission of said testimony, plaintiffs then and there excepted.

The same question was then asked as to the conditions as they existed in 1895, and the same objections were made by the plaintiffs and overruled by the court, and the witness made the same answer.

To which ruling of the court plaintiffs then and there excepted.

Testimony of W. M. Johnson.

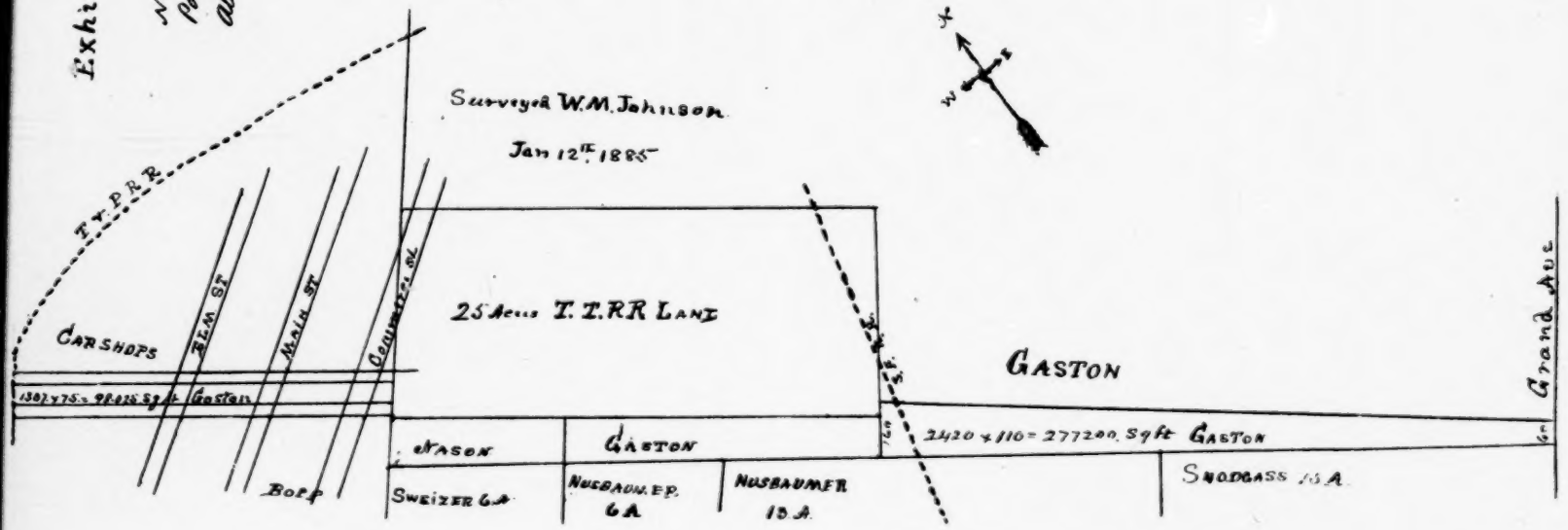
Redirect examination:

On the redirect examination, the witness testified as follows:

The railroad company never used or needed more than 12 feet on each side of their track for loading and unloading and delivering of freight they actually hauled. My testimony as to what they might need is based upon its being a very different railroad from what it was. They did not have any business in 1888 hardly except the wood business. If the company had a turn-table they would not need a Y, but without a turn-table they would need the Y. If the scheme was carried out they should have a round-house, and that would require a turn-table, and that would dispense with the Y. The Y was just a temporary affair upon top of the ground; no grading was done; just ties laid on top of the ground and rails laid on them, and intended to be used until they could get their round-house. The character of the construction was temporary. They would need an acre and a quarter of land in connection with the Y, including both horns and the tail, including the land between the two horns. The land between the two horns would be of no service particularly. When the railroad was
165 built the land was outside the limits of the city of Dallas. In 1889 I think it was taken inside of the city limits. That 25-acre tract don't touch the T. & P. railroad at any point. It was about 1200 feet from the T. & P. railroad. It don't touch the H. & T. C. at any point. It is about 3000 feet from the H. & T. C. It did touch the Santa Fe, but the Santa Fe never had the depot there. It is a mile from the station on the Santa Fe. The 25 acres is two miles from the post-office in Dallas. When the railroad was constructed in 1880, that was not a convenient point for receiving and

Exhibit C

No. 376. Pardue vs Aldridge } p. 167.



delivering freight; there was no street open there then. Neither Commerce nor Main street was open. The streets were extended out there nine years afterwards.

Q. Was there any mud out there in the winter time?

A. Oh, Law, hum! black waxy ground. It was not possible to haul any freight to or from that point in wet weather; we generally have wet winters. The Texas Trunk railroad ran around in connection with the T. & P., and I think delivered their freight in the T. & P. yard, and their passengers at the union depot. That was in the beginning. They did not then use this 25 acres for a terminal. Then for a while they run down to the Santa Fe station, and now they are running to the union depot again. The 25 acres was used as a terminal for wood wagons, and for a while they landed the passengers at that box house, and let them stand out there in the wind and rain until they could take them up. That did not last very long.

Testimony of W. M. Johnson.

Recross-examination:

On the recross-examination, he testified as follows:

The Texas Trunk railroad used the union depot from 1880 to 1884, I think. They connected with the T. & P. north of this 25-acre tract. I think they used the Santa Fe station about four years. I do not know where they kept their engines during this time. I think they just hung them out in the weather anywhere. They had no round-house and no freight station. They had nothing except this box house for a ticket office. There is no 25 acres of ground unoccupied in the city of Dallas better situated for the use of the Texas Trunk except Gaston's ground. They could have picked out 25 acres there adjoining it. Nothing nearer town was available. In my direct testimony, as to the amount of ground covered by the track I only alluded to the end of the ties, and 12 feet between the tracks. They did not need this Mays tract for depot purposes, but it would have helped them to put the track in better condition as ballast.

166 *Testimony of W. M. Johnson.*

Redirect examination:

On redirect examination by plaintiffs the witness testified as follows:

There was a suit pending between W. H. Gaston and the Texas Trunk Railroad Company about the land he contracted to sell to the company. I made this map which was used in that suit. I made this map for Captain Gaston. It showed the land involved in the suit of Gaston *vs.* The Texas Trunk Railroad Company.

(The map referred to was here introduced in evidence. The following marked Exhibit C, is a substantial copy of the same.)

(Here follows map marked p. 167.)

168 *Testimony of W. M. Johnson Continued.*

The Gaston suit against the Texas Trunk Railroad Co. involved a strip of land beginning at the south corner of the 25-acre tract, and running southeasterly to Grand avenue, about 2570 feet, 60 feet wide at the south end, and 160 feet wide at the north end; also, another tract extending from near the corner of the 25 acres to the T. & P. railroad, 75 feet wide and 1307 feet long. This map also shows other tracts of land owned by Gaston and other parties, and the present location of Elm street, Main street and Commerce street. W. H. Gaston owned the land between this 25 acres and the T. & P. railroad. I want to correct my statement about the Mays tract. The company only used about one and a half acres of the land for sand and gravel.

Testimony of Gen. W. L. Cabell.

Gen. W. L. CABELL, being sworn as a witness for plaintiffs, testified as follows:

I am a soldier and an officer by profession and am a graduate of West Point. I was educated there as a surveyor and engineer, and practiced that profession after the war. I am 72 years old. I was a director and vice-president of the Texas Trunk railroad as originally inincorporated, and most of the time was its manager and acting president. Dr. Graves, the president, never lived in Texas. I purchased the 25-acre tract from Hughes and Slaughter for the Texas Trunk Railroad Company. The company had at that time a contract with Capt. W. H. Gaston to buy another tract of land lying between the 25 acres and the T. & P. railroad, in the shape of a flat-iron. Capt. Gaston agreed to let us have this piece of land, but I don't remember how many acres there were in it. The contract was not in writing. The railroad company took possession of the land with Capt. Gaston's permission. They built their railroad on the west end of this Gaston tract. I think there were two lot- between the Gaston land and the T. & P., owned by other parties, but the road was commenced on Capt. Gaston's land before a foot of dirt was taken from anybody else's. I should think there were 11 or 13 acres in this flat-iron strip. That flat-iron track was purchased from Gaston for buulding machinery shops and running switches on it, and the houses and everything connected with the railroad and depot. We expected to put up a depot on this Gaston land. There was a contract that we were to pay him the full value of the land that we would use for machine shops and depot purposes, lying between the 25 acres and the T. & P. railroad. I think the agreement was that when we paid him for that piece of land he would give us the right of way all through
169 his land. And I think the price was about $1800, if I remember right. About $150 per acre. The company never got a deed from Gaston to the land while I was connected with the road, because they were not able to pay for it. That is the only

reason I know of why they did not get a deed. I was land commissioner of the road, and had charge of all the lands, and negotiated for the purchase of the 25-acre tract from Hughes and Slaughter. I had a perfect record of the lands owned by the company. This record was turned over to a man who was one of the receivers, or an agent of the receiver, with the request that he bring it back, and I have never seen it from that day to this. I have tried several times unsuccessfully to get it. The deed from Hughes and Slaughter was not delivered until several months after its date, because the company did not have the money to pay for the land, and the deed was not delivered until the money was paid.

(Here counsel exhibited to the witness a draft for $1250, dated May 18, 1880, drawn by C. C. Slaughter on the Texas Trunk Railroad Company, Dallas, Texas, in favor of the City National Bank of Dallas, endorsed on the back of the draft as follows: "Received on this note $200, September 16th, J. C. O'Connor, V. P. $1050, paid September 25th, 1880." Counsel also exhibited to witness a wrapper, endorsed as follows: "No. — September 25th, 1880. C. C. Slaughter $1250, 12½ acres land. Paid September 25th, 1880. Payment approved, W. L. Cabell, vice-president and general manager T. T. R'y Co.")

Witness proceeded:
This is the check we paid for part of the land. The deed was not delivered until after the check was paid.

Plaintiffs here offered the above check or draft in evidence. The defendants objected to its admission, which objections was sustained. —and plaintiffs excepted.

Witness continued: I signed my name to the back of this wrapper September 25th, 1880. I think it is the date the money was paid. I know the deed was left there with Capt. Gaston, or with the bank, and the money was not paid until several months after the transaction was made. Malcolm Henderson was general manager of the railroad when the land was bought. He is dead now. The purpose for which this 25 acres was bought wad discussed between myself and Henderson and Col. Simpson, who was the attorney of the road. I was then acting president myself. Dr. Graves, the president, was notified of everything that was done. We bought the 25 acres for railroad purposes, laying down switches, and such things as that,
and if the land was not required to sell it into lots for the em-
170 ployees to live on. All that was necessary for the tracks and switches was to be used for that purpose. When said 25 acres was purchased it was the intention of the company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots, and let the men employed by the railroad purchase them and build residences on them in order to be close to their work. That was the intention of the road, and at the same time they were to use all that was necessary for switches and tracks, and

such things as that. There was an old well on the 25-acres tract when we purchased it. All the land east of the well was to be sold off into lots. That was the understanding between us. That was our idea. I cannot tell without some calculation how many tracks could be put on a hundred feet of ground. They generally pit them down far enough apart to prevent them from bothering each other; six or eight tracks; though, very easily. We never had but two tracks when I had anything to do with it. The Mays tract was bought the same way; that is, the railroad used whatever was needed for tracks and sand, and the balance was to be divided up into lots. All the lots in Kaufman and Houston counties involved in this suit and acquired by the first company were donations given to the company to aid in the construction of the road. I think the company used a few lots in Kaufman, but none of the other. The first company now owes me about $2300 or $2400. I had two judgments against it; one was paid off at 50 cents on the dollar, and the other one has never been paid. The company also owed other debts; a good many, I understand, have never been paid.

Testimony of W. L. Cabell.

Cross-examination:

On cross-examination, witness testified as follows:—

My judgment is in the district court of Dallas county. I have an interest in this suit. I turned my claim over to the trustee, Mr. Bumpas, in order that he might subject the property of the company to pay my debt and the debts of others. I refer to the deeds executed a few years ago by myself and the other directors of the first company, to Mr. Bumpas, trustee. I think the deed recites the consideration of one dollar and other valuable considerations. The one dollar was never paid; it was considered paid by me, though not actually paid. I don't remember the date of the purchase of the Gaston tract lying between the 25 acres and the T. & P. railroad. It was about the first transaction, before the purchase of the 25 acres from Hughes and Slaughter. At this point the T. & P. makes a curve. The land was very much in the shape of a flat-iron, and the point of it was east, and the but- of it was to the west. The
171 Texas Trunk railroad runs across the extreme west end of the flat-iron tract, and left a strip through it about fifty feet wide, lying west of the tract, and the rest of the flat-iron tract was east of the Texas Trunk railroad. The distance from the 25 acres to the T. & P. railroad was about 1307 feet. No shops or buildings were ever put upon this Gaston land by the Texas Trunk railroad. We thought the land we would get from Gaston would be ample to put all of the depots and shops on it. We intended to put a car shed on the 25 acres. The depot was just a little building we purchased from somebody, and it was put there for temporary purposes on the Hughes and Slaughter tract, to keep it from being in the way when we build a regular depot. We did not consider at all the contingencies that would arise from non-payment. We considered the

Gaston land very important for the reason that it was closely connected with the Texas & Pacific, and it was in a fine location. The 25 acres is the only land the company ever bought and actually paid for that is now in the city of Dallas. Slaughter was to get $1250 for his half interest in the land. I have seen this $1250.00 check before, and I am satisfied I requested its payment, and that's about all I can tell you now. That is as far as I can recollect. I understood it was for the purchase of that land. No part of the 25-acre tract or the 11–92/100 acres tract was ever divided into lots by the railroad company, and no part of it was ever sold, so far as I know. The Mays tract is about 3 miles or more from the courthouse.

Testimony of W. L. Cabell.

Redirect examination:

On the redirect examination, he testified:

The object of the deeds executed by myself and the other directors to Mr. Bumpas, trustee, was to pay the debts outstanding against the original company.

Counsel for defendants objected to all testimony as to the purpose of the deeds. Objection overruled. Defendant- excepted.

The object of the deeds was to subject the land of the Texas Trunk railroad to pay the debts due people for labor, and for other debts for articles furnished, and for such debts as railroads generally incur, and to get my own debt principally, which was $2350.00, and I gave that to Bumpas on no other purpose on God's earth than to get my money, and to assist my friends who I knew had claims against the railroad and had been deprived of rights, and I would have given them that right without one cent being paid to me unless the whole amount was paid. There was no other purpose in executing the deeds.

172 *Testimony of W. L. Cabell.*

Recross-examination:

On the recross-examination, the witness testified:

I don't know what debts were against the company only what a good many men told me. I can remember some of them, Robinson, Simpson and others. Robinson and Simpson joined in the deed. I don't remember any one else. It was intended to include everybody stated in the list that was r-ad over to me, but I don't now remember who they were. Mr. Moroney had a partial list and somebody showed me another list but I don't remember who. I am not able to state what particular creditors were to have the benefit of this transaction. I intended to subject the land of the company at any rate to the payment of these debts. That was the object of it, and nothing else that I know of.

Testimony of Col. James B. Simpson.

Col. JAMES B. SIMPSON, a witness for plaintiffs, testified as follows: I was one of the directors of the original Texas Trunk Railroad Co. I was also its managing attorney. My principal business was with the legal department, but I also acted as a director. I have a vague recollection of an attempted purchase of the tract of land lying between the 25 acres and the T. & P. railroad, and our failure to get the money to pay Gaston for it. We never did pay Gaston for that tract of land. Gen. Cabell had that matter in hand. He was not only our vice-president but general manager here. Dr. Graves, the president, did not live here. Cabell was really the acting president, and had control of all the land, and was land commissioner, and these matters fell largely in his hands and under his jurisdiction. There was some sort of an agreement for purchasing that land from Gaston. That Gaston tract or flat-iron tract was to put shops on and a depot, and to make connection with the T. & P. railway I understood. I subsequently purchased a portion of this Gaston tract for a company I organized known as the Dallas Car & Agricultural Implement Mfg. Co. This company built extensive car shops on the land, a very large building, for the purpose of the manufacture of railroad cars and agricultural implements. One of the inducements to put these shops there was the promise on the part of the Texas Trunk Railroad Company to build its cars and the general repair work that the railroad had, and we expected to do this, and that was the chief inducement upon my part to put these works there, and it was the view of that contract that I was to do this work. I was president of the car company. We actually did a good deal of work and repairs for the Texas Trunk Railroad Company, and did some what you would consider
173 blacksmith work, and cast some pieces for them. The plant covered about three acres. We filled it with extremely expensive machinery, the value of it I do not now recollect, but it was the very best we could get. J. M. Brosius was manager of that company. The concern failed afterwards. That is the same property now occupied by the Munger Manufacturing Company.

At this point the court excluded all testimony as to the car shops, and instructed the jury not to consider the testimony for any purpose, to which ruling of the court plaintiffs then and there excepted.

Testimony of James B. Simpson.

Cross-examination:

On the cross-examination the witness testified as follows:

This Gaston tract was never paid for by the railroad company, and was never deeded to the railroad company, so far as I know. Capt. Gaston afterwards sold a part of it to the car company I spoke of. I don't recollect the date of the sale to the car company; I think about 1881 or 1882, before the first receivership. I cannot say defi-

nitely what the 25-acre tract was bought for; I have simply an impression upon my mind; it may have been discussed in the directory but I have forgotten it. I was one of the directors of the Texas Trunk at the time of the foreclosure sale under the International Trust Company mortgage, and I am the same James B. Simpson who joined in the deeds to Bumpas, trustee. No money was paid. The understanding was that Bumpas held for certain creditors of the Texas Trunk Railroad Company. I cannot recollect who these creditors were now. I may not have known all of them. But I knew a good many of them. I think the purpose was more for the convenience of a suit than anything else, so he could recover it for the benefit of the creditors of the company. In the suit brought by Bumpas *vs.* John F. Ely *et al.* I was attorney for all of the defendants except Gaston, receiver. I made no defense to the suit, and did not appear at the trial. I am a creditor of the Texas Trunk Railroad Company, and this conveyance to Bumpas was intended for my benefit as well as for others. I think it was intended for the benefit of all creditors of the company, probably those who would come in and pay their proportion of the expense of the suit. There was no written agreement in reference to it, other than the deed, that I am aware of.

Testimony of W. J. Moroney.

W. J. MORONEY, witness for plaintiffs, testified as follows:

I am a member of the firm of Dickson & Moroney, attorneys
174 for plaintiffs in this suit. Mr. Bumpas was a stenographer in our office when he was first selected as trustee, and when the Texas Trunk litigation first come into our hands a number of years ago. He was our stenographer for six or seven years. Some time ago he left our service to become the private secretary and stenographer of Judge McCormick of the Federal court, and went from here to New Orleans where he spends most of his time. I understand that is his employment now. Mr. Bumpas never had any interest in this suit. He was simply selected as trustee on behalf of the creditors of the Texas Trunk Railroad Company. We selected him because we had confidence in him then as we still have but this matter involved the review of a good many matters that had been passed upon by Judge McCormick in the Federal court, and there was a probability at least a possibility that it might come before him again. Under the circumstances, after consulting with Mr. Bumpas, we reached the conclusion that it would be placing Mr. Bumpas in an indelicate position to be the confidential clerk and stenographer for Judge McCormick at the same time he was acting as trustee in a matter that involved so much of Judge McCormick's action. We, therefore, determined to change trustees, and after come consultation Mr. Mowry, Mr. Aldridge and Mr. Hardie were selected as trustees. One of the reasons for selecting Mr. Mowry as trustee was that he was a citizen of New York and I thought that would prevent a removal to the Federal court. They held the title precisely as Bumpas held it. One of the beneficiaries

of the trust was J. E. Downes, who lives at Crockett, Texas, and whose judgment is in evidence here. Another beneficiary was H. M. Spaulding, with a judgment of between $7000 and $8000. W. A. Rodgers of Dallas, with a claim of $1000, Gan. Cabell with a claim of $2400 or $2500. John F. Ely had no claim or debt that I am aware of against the company. The company may have been indebted to him, but there is no judgment in his favor. There were judgments in favor of Robinson, Spaulding, Cabell, Simpson, Rodgers and quite a number of others. The purpose of the trust was to get these lands for the benefit of the parties who had valid and enforce-able demands against the company, and divide it out equitably among them in proportion to their claims. Mowry's claim is $3000.00 and interest. His claim is against the last company. It was a question of whether this property belonged to the last company or the first company. A. D. Aldridge of this city and the Southwestern Mfg. Co., of which A. F. Hardie is manager, are in this trust. A. D. Aldridge is a beneficiary conditionally. His interest is about $200.00. His claim is against the last company. A. F. Hardie is not
175 individually one of the beneficiaries. The claims against the last company represented by us are William G. Mowry $3000; A. D. Aldridge, $200.00 about; Southwestern Mfg. Co. about $200.00 and Mosher Mfg Co. about $75.00. These are all the claims that I now recollect against the last company that are represented by us in person; but it was understood that other creditors standing in the same position should be equally interested, to the extent that the properties of the respective organizations were incorporated in the trust. It was impossible to then know, and it is impossible to know now precisely what property belonged to the first company and what property belonged to the last company. According to the records some of the property belonged to the last company. It was a very serious question whether a good deal of the property of the first company did not pass to the last company. It was a question I could not decide, and the courts will have to decide it. When these claims came into our hands I did not know that there was more than one company. When, upon further investigation, I learned that there were several companies, I informed my clients that I could not represent conflicting interests, and it was thereupon agreed between them that so far as they were concerned, they would pool the issues, and if any of the property was held to belong to the first company, the creditors of the last company represented by us should be interested in a *pro rata* amount with the creditors of the first company represented by us, and *vice versa*, but no agreement was made or attempted to be made for the rights of the creditors not represented by us, of either company. I explained to all of the creditors represented by me that it was necessary for them to make a common cause. I have no definite information of the company owning any other property except what is embraced in this suit. My object was to get as much land as possible to pay the debts. I could not possible get enough to pay the debts in full in any event. The debts of the first company amounted to upwards of $30000.00

with interest from about 1881 or 1882. The suit by Bumpas, trustee, vs. Ely *et al.*, was brought before there was any agreement with the trustees of the first company. I got the deeds from the trustees of the first company pending this suit. There were no agreements in that case except those that are in the record. The only agreement I had was put in writing. Gaston, receiver, was represented by H. C. Coke and Judge Charles Fred Tucker. They were not present when the case was finally tried. Judge Tucker did appear once or twice when it was called for trial or set for trial, but when the case was reached nobody was there representing Gaston.
176 The case was not reached on the day it was set. I find among the papers the following agreement:

"In the District Court of Dallas County, Texas, 44th Judicial District.

C. C. BUMPAS
vs.
JOHN F. ELY ET AL. } No. 14047.

"The issues arising on the pleading in said cause between plaintiff and defendant, John H. Gaston, receiver, are hereby submitted to the court on the following agreed statement of facts, subject to such other evidence as either party may offer in evidence:

1. It is agreed that the paragraphs 1, 2 and 3 of plaintiff's original petition are true.

2. It is agreed that on the 22nd day of March, 1880, the original Texas Trunk Railroad Company executed to the International Trust Company of Boston, trustee, a mortgage to secure a series of bonds therein mentioned, in which mortgage the property embraced or intended to be embraced in such mortgage is described as follows:—

(Here follows a correct copy of the description in said mortgage.)

Said mortgage was afterwards foreclosed, and defendant John H. Gaston dereigns title by a valid series of mesne conveyances, through said foreclosure sale. In the bill of complaint and final decree of foreclosure in said foreclosure sale, the property is described substantially in the same terms as in the mortgage.

3. Said original Texas Trunk Railroad Company acquired a valid title to the several tracts of land described in the plaintiff's petition, from the respective parties as mentioned in plaintiff's petition on the respective dates therein stated."

DICKSON & MORONEY,
Att'ys for Plaintiff.

CHARLES FRED TUCKER,
H. C. COKE,
Att'ys for John H. Gaston, Receiver.

That agreement was originally between the plaintiff- and Mr. Coke and Judge Tucker representing the defendant Gaston. My recollection is that there was another agreement, a very short one,

signed by the other defendants which simply adopted this agreement. I do not find this subsequent agreement among the papers. There was also oral and documentary testimony on the trial in addition to that agreement. I don't recollect the testimony that was introduced. I had a couple of witnesses on the stand and one deposition. The deposition was read in evidence. I suppose it is in the clerk's office now. I suppose it took an hour to offer the testimony in the case. I suppose I offered these deeds in evidence and
177 all the other testimony I had. I have not named all the creditors of the first company represented in this trust. I can name them though, if I am able to find a memorandum in my office, which I have not been able to lay my hands on. I do not know whether or not there are any other creditors than those represented by Dickson & Moroney. It was attempted to embrace in this trust all the creditors who had subsisting claims against the company, and all the creditors that I know of having subsisting claims against the company were embraced, except some creditors of the last company who declined to take this course and preferred to take a different procedure. I never represented the International Trust Company. If it has any interest in this suit it is by operation of law. I did not represent the Central Trust Company. If it has any claim against this property it will have an opportunity to recover it after this suit is disposed of.

Plaintiff- rested.

Testimony of Capt. W. H. Gaston.

Defendants' evidence.

Capt. W. H. Gaston, being sworn as a witness for defendants, testified as follows:—

I have resided in Dallas 30 years. I am acquainted with the 25-acre tract bought from Hughes and Slaughter. I have known that land since 1879. I know something about the purpose for which that land was bought by the railroad company. I was encouraging the construction of the road and wanted to see it built. I talked with Mr. Henderson, who is now dead, and with Gen. Cabell and others. They seemed to be the active men in it. I own land in the neighborhood of this 25 acres. I also owned this 25 acres at one time.

Defendants' counsel here asked the witness the following question:—

Q. "Do you know from circumstances coming to your knowledge at the time, what the 25 acres was acquired for by the Texas Trunk Railroad Company?

Plaintiff- objected to the question on the grounds that the intention of the railroad company cannot be shown by the declaration of individual directors of the company, it not appearing that they were acting as a board or acting in any manner so as to bind the company.

The objection was overruled, and the witness answered :—

A. "I know what Henderson told me; he wanted it for terminal purposes."

To the admission of said testimony and the overruling of the above objections the plaintiff- then and there excepted.

178 I know that Henderson was also trying to acquire other lands for the Texas Trunk Railroad Company for terminals; he wanted more. I heard Gen. Cabell's testimony yesterday. I am the W. H. Gaston referred to by him. I cannot remember exactly about the land I was to sell to the Texas Trunk Railroad Company. It was never paid for. I have a judgment in the State court for the land the company occupies, about 13 acres, I think. It is the right of way of the Texas Trunk, most of it. I am in possession of all of the flat-iron tract except the right of way, about 400 feet long. I never made a conveyance to that. They never paid me for it. I still own the long narrow strip of land occupied by the railroad as a right of way, running from the north corner of the 25 acres to the T. & P. railroad, and from the south corner to Grand avenue. The railroad company never has owned it. This strip between the north line of the 25-acre tract and the T. & P. railroad is the flat-iron piece of land that Gen. Cabell was talking about yesterday. The map shows Elm, Main and Commerce streets extending across it. None of these streets were there when the Texas Trunk was started. I originally had 407 acres of land out there. At that time I still owned the greater portion of it. Henderson said he wanted to buy all told out there 45 or 50 acres of land. There were 25 acres in the Hughes and Slaughter tract, and I suppose about 8 acres in the other land occupied by the railroad, but to which they did not get the deed for. That would make 33 acres, and it would take 17 acres more to make 50 acres. It is my recollection that in addition to the 25 acres and in addition to this other land he wanted 17 acres more. None of the land was platted. Henderson wanted part of the flat-iron tract anyway. I cannot be positive how far up here he wanted it. It is my recollection that he wanted as much as 16 or 17 acres. I told him I would sell him what land he wanted there. The agreement was that he should have the land included in my deed, but I don't remember how many acres I did include in that deed. I made the deed and deposited it. My recollection is indistinct now. I took possession of the land when the road went into the hands of the receiver. I got most of it back. I have since platted it and sold it to different parties. Henderson did not tell me precisely what he wanted to do with that tract. He did not know exactly where he was going to locate his depot, and I did not know myself. It did not make any difference to me whether the depot was located 100 feet one way or the other, just so it was located in that vicinity. I was interested in having it located in that neighborhood. It made no difference to me whether it was located on the flat-iron tract or the Hughes
179 & Slaughter tract. They actually commenced work on my land. They went into possession there without any deed.

They never had a deed. I don't know whether or not Henderson intended to divide the 25 acres into lots. I don't know whether he intended to locate anything on it. He never told me. My recollection is he just wanted about 50 acres of land out there. That land was out in the country then. The corporate limits of the city were some distance this side of there at that time. Commerce street was opened up about 1885 and Exposition avenue probably a little earlier than that. The Rapid Transit railroad was put there 10 or 12 years ago. The Trunk was built before the Santa Fe was, and the Santa Fe a short time afterwards.

On the redirect examination, the witness testified:

The Texas Trunk railroad is located on a long strip of land, shown on the map, running from the south corner of the 25 acres to Grand avenue; I think somewhere between 6 and 7 acres. I don't remember when the deed deposited in escrow by me was returned to me. I never was a stockholder of the Texas Trunk Company, nor an officer or director of the company. I never had anything to do with its organization down to the present time. There never was any occasion for the officers or directors of the company to come and consult with me about anything they wanted to do. Nothing was talked to me about selling the land into lots. I don't remember that they ever told me anything about dividing it.

I don't think I ever had any talk with them about it. I remember that Simpson seemed to be an officer of the road, and General Cabell was general manager, and I think the deed was returned to me by their order. They said the road could not be built, and they could not pay me the money, and they would not ask it to be held any longer.

On the recross-examination, the witness testified as follows:

It is possible that Henderson may have told me about subdividing this land into lots, but I don't remember it. It has been too long ago.

Testimony of William Whyte.

WILLIAM WHYTE, a witness for defendants, being sworn, testified as follows:

I am now and have been connected with the Texas Trunk railroad since September 1, 1891, beginning with the appointment of Dillingham as receiver. I held the position of superintendent under Dillingham and Atkins, receivers, up to September, 1896, when I
was appointed receiver myself, since which time I have been
180 acting receiver. I am familiar with the 25-acre tract in East
Dallas and the 11–92/100-acre tract in the Lagow league involved in this suit. I have known these tracts since I took charge of the road in 1891. The company has never owned any land in the city of Dallas that I know of except this 25 acres outside of its right of way. When I took charge in 1891 the road used the station at the northwest corner of the 25 acres. We abandoned that station and discontinued running trains up there in February, 1892. Since then we have been running to the union depot at the inter-

section of the Houston & Texas Central and Texas & Pacific. We have used the Houston & Texas Central freight depot downtown. The Texas Trunk railroad has no interest in the union depot. We have no lease or contract for the use of these terminals for any definite period; the contract is from day to day as long as agreeable with the H. & T. C. officials; it can be terminated at any time. The reason why we use those present terminals and stations is because it was found that they were better and cheaper facilities than could be obtained in East Dallas. We pay nothing directly for the use of these facilities. I had an arrangement with the H. & T. C. railroad that such freight as we had from our line we would give to them instead of other lines if they would give us these facilities. We turned over to the H. & T. C. freight going from our lines unless it is routed directly over some other line. They gave us the use of the terminals in consideration of our giving them freight. We pay one man at the union depot; he is a clerk up there; the balance of the facilities are free under this mutual arrangement.

Here counsel for defendants asked the witness the following question:

Q. Assuming that the Texas Trunk railroad takes care of its own engines, has its own round-house and engines, and its own yard and facilities, what do you say of the necessity of the 25-acre tract for the use of the company instead of using other company-s' yards and facilities?

Plaintiffs objected to the question on the same grounds that they objected to W. M. Johnson's testimony on the same subject. The objections were overruled, plaintiffs excepted, and over said objections and exceptions, the witness testified as follows:

A. The ground would be absolutely necessary to have terminals; you could not get along without them; all of it would be necessary as it now stands. If the road were extended over the route called for by its charter from Dallas to Sabine Pass with a branch from some point on its main line to the Sabine river this 25 acres would not be enough.

Continuing without objection, the witness testified as follows:

181 When I first became connected with the road there was a small depot on the 25-acre tract, I think 12 by 14, not now in existence. There was a sand-house for drying sand and a blacksmith shop and an oil and waste house and some small temporary buildings. I don't remember now the extent of them; we used these improvements at that time. That is all I had to do with when I started. We used that land as our terminal up to February, 1892, when we connected with the H. & T. C. There was no car shed on the property when I first became connected with it. There was a foundation for a two-stall round-house—it was not a round house but a square house, but it is termed a round-house. There was a foundation, wooden walls put down, and this drawing on the map has no resemblance to anything that was on the ground when I took charge of it.

This little office and water tank on the map is about correct as to location. My recollection is there was a complete Y on the property when I took charge. A Y has two curves and a stem. I cannot well locate on the map the other leg of the Y because the leg of the Y on the map is not located to suit; it was farther south. The stem of the Y was 75 or 100 feet long, as well as I recollect. Both prongs of the Y connected with the main tract of the Texas Trunk. I guess that the stem of the Y terminated about 150 feet from the northeast boundary of the 25 acres. I took that Y up. I used it about four months before it was taken up. I think I took it up in March, 1892, after I commenced running to the H. & T. C. terminals. I took it all up; no part of it is there now. The reason I took it up is because I had no iron to make repairs with on the main line and I had to have something, and as soon as I could dispense with it I took it up to make some repairs on the main line. The main line runs across that 25-acre tract. We have done switching over there to quite an extent—I suppose an acre and a half of it perhaps was used for switches, and during the fair we would run passengers up there *in* as — convenience—to let them off near the fair grounds. It has been in continual use during the receivership to the extent indicated. The 25 acres has been used to unload freight on to some extent and I have been fencing part of it to keep trespassers off, and I have been looking out for the property.

We have been hauling sand from the Mays tract for the last six or seven years to repair the road-bed and for surfacing it and keeping it in order; it was necessary for that purpose. I presume about two acres of the land was used up to March 16, 1896. There is no other place on the road where we could get sand to ballast the tract except off the right of way. This Mays tract is necessary for
182 sand to ballast our track. I do not know how we could get along without it exactly.

Here counsel for defendants asked the following question:

Q. If the Texas Trunk should be put in the average condition of other Texas roads, state whether or not all of the tract would be necessary for it?

Plaintiffs objected to the question on the same grounds that they objected to a similar question propounded to the witness Johnson. The objections were overruled, plaintiffs excepted, and over said objections and exception the witness testified, as follows:

A. All of the tract would be necessary and more.

On cross-examination by plaintiffs, the witness testified as follows:

I came to Dallas from Austin, Texas, where I was road-master for the Western branch of the H. & T. C. railroad. I have been employed by railroads in which I understand Huntington is interested for 25 or 26 years. I have heard that the H. & T. C. railroad is a part of the Huntington system. I came to Dallas about two weeks prior to September 7, 1891. Mr. Quinlan, of the H. & T. C. rail-

road, wrote me a letter to come to Dallas and that Mr. Dillingham would later see me in Dallas. They did not then tell me that a receiver was going to be appointed of the Trunk road. I did not know what I was waiting for. As soon as Dillingham was appointed receiver he appointed me to take charge as superintendent. Dillingham had nothing to do with the actual managing of the road; he turned it over to me, as far as the physical work was concerned, and the operation of the road, and I have had practical charge of the road ever since. I have received hardly any instructions. I am following out the orders of the court. The court has made no orders more than carrying out the arrangements of Mr. Atkins, receiver—just turning it over from one man to another. What little money I have had I have been putting in the bank. I have not had any money to turn into the registry of the court. I have been putting money into the road-bed and necessary improvements and it is practically all gone.

I think there are a few old ties of that Y still sticking in the main tract where the frogs were set. That Y was thoroughly graded; we had a good deal of trouble about it; people came and hauled the gravel away in wagons; people stole it and it is all gone. The fencing that I spoke of consisted of about 30 pieces of old railroad iron put up as a sort of barrier near Commerce street. I fenced across Commerce street along Exposition avenue, and it was simply a barrier; that is all the fencing I did. Of course, people could drive all over the ground In 1892 we moved all of
183 the timber and lumber in those houses; they were not worth hauling off or placing anywhere. I think I took some down the road to make old repairs. The map may be correct as to the location of the parallel siding. I suppose it is about 24 feet from the center of the main tract to the center of the side track. There is nothing there now except the main track and this side track. There is no building there now. There has been nothing there now since 1892 except the main track and this side track and that well. We did not use that well; it has always been there since I have known it. The company never dug that well so far as I know. Since 1892 we have been hauling more coal than wood, I believe, on that track. We have been hauling coal to supply the ice plant and other parties out there. The coal is transferred to us from other lines. We sometimes ship coal into Dallas; we get it from connecting lines—the Texas Midland, the M. K. & T., the T. & P. and the H. & T. C. roads. The only connection we have with the M. K. & T., H. & T. C. and T. & P., is the local connection for transfer purposes. The Texas Trunk has shipped three or four car-loads of coal to Dallas by way of Kaufman. I do not know whether 25 feet on each side of the track would cover all the land actually used since 1892—contingencies might come up. You should have enough room for wagons to come between the cars there so you would not strike the teams; 25 feet is not far enough. In throwing wood off they throw it far enough, so a wagon could come between. I can throw a stick of wood more than 25 feet—some of it slides off. The men out there are not powerfully strong necessarily.

Here counsel for plaintiffs showed the witness the following instrument, filed in the United States circuit court in the case of The Central Trust Company *v.* The Texas Trunk Railroad Company:

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

CENTRAL TRUST COMPANY
vs.
TEXAS TRUNK RAILROAD COMPANY.

To the hon. judge of said court:

And now in the above entitled and numbered cause comes Charles Dillingham, receiver of the Texas Trunk Railway Company, and with respect unto the court represents:

That the said Texas Trunk Railway Company is practically without terminal facilities at Dallas, the most important point on its line. The only terminal facility the said road now has at
184 said Dallas is a little depot in East Dallas of the following dimensions, to wit: a frame house fourteen feet long and ten feet wide.

That said depot is one and one-fourth miles from the business portion of said Dallas, and is about one mile from the depot of any other railway running into said Dallas.

That because of the want of connection with other roads all freight hauled by said road to and from Dallas has had to be by it at its own expense transferred. That the expense of making such transfer amounts to about $195.00 per month. That because of the distant and inconvenient location of said depot the said railway loses a great deal of freight and passenger traffic which it would obtain at much profit if it had proper terminal facilities and a connection with some trunk railway.

That the cost of making the present terminal facilities adequate would be very considerable, and that even were such expenditure made still the extreme disadvantage of the want of a terminal nearer the business portion of said Dallas and the want of a connection with some line of railway would still exist, and for these reasons your receiver suggests that a connection with some line of railway which would permit the use of its tracks and terminal facilities would be both advisable and profitable.

Your receiver now shows that he can, by constructing about a mile of road, make a connection with the Houston & Texas Central railway, a trunk line. That said mile of railway, including the price to be paid for right of way, can be constructed at a cost of about twelve thousand dollars, and said twelve thousand dollars can be procured by your receiver by the sale of certificates at par at 7 per cent., such certificates to be a lien only upon the mile of road so constructed.

Your receiver has caused a survey of said mile of railway to be made and here presents accurate maps and plats thereof, and to locate same the field-notes following are submitted: Beginning at a

point where the Rapid Transit railway crosses the Texas Trunk railway; thence in a southerly direction along the center of said Texas Trunk railway, which is the point of curve (15 deg.) and the initial point of connection between T. T. R'y and H. & T. C. R'y, desired to be made; thence 592.7 feet with a 15 deg. curve crossing certain property belonging to Rapid Transit Railway Land Company to point of tangent on Warren avenue in Westminister addition to the city of Dallas; thence along Warren avenue 4007.3 feet crossing Burr lane and entering South Park addition on said Warren avenue to a point of 50 deg. curve at station 46 of said con-
185 nection; thence on 15 deg. curve 660 feet to the center of H. & T. C. R'y, a stake which is 950 feet south from intersection of H. & T. C. R'y and Rapid Transit R'y crossing block — in South Park addition to the city of Dallas.

Your receiver further represents that favorable, desirable and advantageous arrangements can be made with the said Houston & Texas Central Railway Company whereby the said Texas Trunk Railway Company will be permitted to use the tracks and terminal facilities of said H. & T. C. R'y Co., which are conveniently located and entirely adequate, and this at a nominal cost compared with the cost of transfer of freights, to say nothing of the increase of said Texas Trunk Railway Company in the way of freight and passenger traffic, and protection to its rolling stock and convenience of repairs to such.

Wherefore, premises considered, your petitioner prays that a decree be entered by your honors authorizing him to construct said mile of railway as shown by the maps and plats thereof and the field-notes above given, including the power to purchase right of way, all necessary material and to contract for the necessary labor, etc., and to issue and sell receiver's certificates to the amount of twelve thousand dollars and to use the proceeds thereof in the construction of said mile of railway and to contract with the said Houston & Texas Central Railway for the use of its tracks and terminal facilities and to do any and all such acts as may be reasonably necessary to perfect the contemplated connection, and for general relief, etc.

BARRY, ELLISON & ETHERIDGE,
Att'ys for Receiver.

Wm. Whyte being duly sworn deposes and says under oath, that he is the superintendent of the Texas Trunk Railway Company, under and by virtue of employment by Chas. Dillingham, receiver thereof; that he has read and is familiar with the allegations in the foregoing petition, and that the same are true as therein set forth and that as agent for said Chas. Dillingham, who is not now personally present, he subscribed this affidavit.

WM. WHYTE.

Sworn to and subscribed before me this 1st day of February, 1892.

BRYAN T. BARRY,
Notary Public, Dallas Co., Texas.

[L. S.]

Endorsed: No. 193 Eq. Central Trust Company *vs.* Texas Trunk R'y Co. Application of Receiver Dillingham for authority to construct additional road to connect with H. & T. C. R'y Co. Filed Feb. 8, 1892. J. H. Finks, clerk, by Chas. H. Lednum, deputy. Barry, Etheridge & Ellison, att'ys for receiver.

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Testimony of Wm. Whyte Continued.

After reading the above instrument the witness proceeded:

I signed and swore to that paper. I remember the circumstances now. I did not go into details in that paper. I stated all that I thought was necessary to state, in a general way. All the facts stated in that paper were true I suppose. I expect I had my books and records before me when I made that statement. I did not think that the 25 acres was a suitable terminal for that road, that is, for freigh- and passengers. Railroads have shops two or three miles from the depot sometimes. The Texas Trunk never had a telegraph line. I meant that the 25 acres was inconvenient for freight and passengers when I made that statement but it would be a first-rate place for shops. I think that land would be a very good terminal now, distinct from the freight and passenger business. It would not be advisable to build terminals in East Dallas for freight and passengers even if we had the money; it would be better to come downtown.

Q. You applied in 1892 to the Federal court for permission to spend $12,000 to build a new mile of road and get down to the H. & T. C., with no understanding except the understanding from day to day that you would have the right to use the terminal facilities of the H. & T. C.?

A. Yes, sir. I will explain that to the jury. I was superintendent for the receiver, Dillingham, and much of this was through his advice; he was talking with the manager of the Central, I expect, and he may have had some understanding better than I had—I do not know about that. I meant to say that I was carrying out Atkins's instructions. I do not know of any change in the rules between Dillingham's and Atkins's administrations. I cannot say that I know anything about the rules between the receiver and the managers of the Huntington road. I do not know who the H. & T. C. road belongs to; I have no proof nor no knowledge about it—we hear these things. I understand that Huntington got charge of the Central along after I went with the Texas Trunk.

The mile of new track that connects the Texas Trunk with the Houston & Texas Central leaves the Texas Trunk about a mile and a half below and southeast of the 25 acres. Since 1892 all our regular trains have been running from this new track to the H. & T. C. terminal. I do not think it is over a mile from the Central railroad and the H. & T. C. railroad up to the 25-acre tract.

This new track branches off from the main line of the Texas
187 Trunk about 700 yards southeast or east of the sand-pit tract. The sand-pit tract is between this point and Dallas. Since 1892 the track upon which we have been running all our

regular trains is about 700 yards from the sand-pit track. I testified that as receiver there was no arrangements to use the H. & T. C. terminals from day to day. I have had a general understanding with Mr. Quinlan, general manager of the H. & T. C., that we would continue right along as it had been and what business I could route his way I would do so and that he would give me round-house and side-track facilities—terminal facilities, and such as that. The H. & T. C. terminals were better for freight and passenger business. That petition to the Federal court was granted and I went ahead and did everything under the petition that I asked to be done.

The rails on the parallel switch where it crosses Commerce and Main streets were torn up for a time but they were replaced thereon four weeks ago.

The foundation for what I called the round-house was made square and they put in two frogs and ran in two tracks that would answer for all purposes.

On redirect examination by defendants the witness testified as follows:

If the H. & T. C. should turn us out of that station the terminal facilities to the connecting track would be worth more to the Texas Trunk than it cost; for the purpose of taking freight from the H. & T. C. it would be worth more any time. It would be worth more than it cost in the way of a terminal alone. Under the existing arrangement the H. & T. C. could terminate the use of their tracks at any time they saw proper.

On recross-examination the witness testified as follows:

We are paying expenses now. As to the cost of that new track being $12,000, when we make a calculation to make improvements it always costs a little less or a little more. I said, with the volume of business, that they could make it pay; that is my judgment.

Assessments.

Defendant next offered in evidence Dallas county assessments for taxes paid by the Texas Trunk Railroad Company and its Federal court receivers from 1889 to 1896, inclusive. They were all substantially in the same form except that the valuations differed more or less from year to year. The following is a substantial copy of the assessment for the year — omitting assessment for rolling stock:

188 Inventory of property owned by the Texas Trunk Railway Company and rendered for assessment to taxes for the year 1892 under act of nineteenth legislature, approved March 28, 1885.

Art. 2686, chap. 63. It shall be the duty of every railroad corporation in this State to deliver a sworn statement on or before the first day of June of each year to the assessor of each county and incorporated city or town into or through which any part of their road may run or in which they own or are in possession of real estate, a classified list of all real estate owned by or in possession of said company in said county, town or city, specifying, 1st, the whole

number of acres of land, lot or lots, exclusive of their right of way and depot grounds, owned, possessed or appropriated for their use, with a valuation affixed to same. 2d, the whole length of their railroad and the value thereof per mile, which valuation shall include right of way, road-bed, superstructure, depots and grounds upon which said depots are situate, and all shops and fixtures of every kind used in operating said road. 3d, all personal propert- of whatsoever kind or character except the ruling stock belonging to the company or in their possession in each respective county, fixing and describing the said personal property in the same manner as is now required of citizens of this State.

Item 1. All lands and toen lots in the county, exclusive of right of way and depot grounds, described and valued on blank attached hereto, and to be assessed as real estate.

Item 2. 20.5 miles of road in the county, including right of way, road-bed, superstructure, depots and grounds, upon which said depots are situated, and all shops and fixtures of every kind used in operating the road, at $6134.63 per mile $125,860.

By C. C. GIBBS.

To J. T. Witt, assessor of Dallas county.

(NOTE.—The following-described land and lots are included in right of way and depot grounds, and are included in and valued with this item 2, and assessor- will not assess the same as lands or lots on their rolls, but they should be credited to the different grants of the assessors' abstracts to prevent their appearance on the unrendered rolls.)

	Abstract No.	Name of grantee or town.	Acres.
	1352	Stockton, S.	2.2
	1166	Pruett, W. A.	3.4
	99	Beeman, J. S.	13.6
	86	Bilhurum, Rob't	11.7
	98	Beeman, J.	3.7
189	648	Hill, Isaac L.	5.7
		Cox, J.	5.
	283	Cox, C.	11.1
	444	Elam, J.	3.6
	1164	Perry, Sarah	14.9
	1167	Pruett, W. A.	1.6
	835	Lewis, W. J.	7.5
	1406	S. A. & M. G. R'y	6.2
	716	Kleburg, R.	20.6
	541	Hider, H.	27.6
	850	Meerchard, J. D.	15.9
	189	Burnett, W.	6.8
	178	Bohaman, H. D.	7.1
	426	Denton, John	3.6
	1245	Riley, J. R.	9.3
	407	Dixon, Sol.	5.3
	1006	McMinney & Williams	3.

1391	S. A. & M. G. R'y Co.....	6.2
262	Cole, W. A.....	2.
495	Grigsby, Jno.....	12.9
759	Thos. Lagow	39.4

Item 3. All personal property of whatsoever kind or character, except rolling stock, belonging to or in possession of the company, including office furniture and fixtures..	$150.00
Trucks, etc., at depot.....	
Machine shops and tools, not used in operating the road, including stock on hand	250.00
All tools, such as picks, shovels, scrapers, bridge-force outfits, and everything used for maintenance of way.....	100.00
	$500.00

(Copy of attached sheet.)

1892.

Inventory of property owned by the Texas Trunk R'y Co., rendered for assessment of taxes for the year 1892 by C. C. Gibbs, agent, to assessor of Dallas county.

Real Estate.

Abstract No.	Block No.	Name of grantee or town.	Acres.	Value.
759	.....	Lagow, T.....	11.92	$1100
.....	828	Dallas.....	22.08	22000

190 THE STATE OF TEXAS, }
County of Harris. }

I, C. C. Gibbs, agent of the Texas Trunk R'y Co., do solemnly swear that the within inventory rendered by me contains a full, true and complete list of all the taxable property owned or held by said company, in the county of Dallas, on the first day of January, 1892, so far as the same has come to my knowledge or is disclosed by the records of my office, and that I have true answers made to questions propounded to me touching the same; so help me God.

C. C. GIBBS.

Sworn to and subscribed before the undersigned, a notary public duly commissioned and qualified, in and for the county of Harris.

In testimony whereof, I hereunto set my hand and affix the seal of my office, this 31st day of March, 1892.

S. L. HAIN,

[L. S.] *Notary Public, Harris Co., Texas.*

Examined and approved in open court this 11th day of April, 1892.

W. A. ORR,
Co. Com'r, Presiding.

It was admitted in evidence that the taxes were paid in accordance with said assessments. It was also admitted that block 828 of the city of Dallas is the same land described in the deed from Hughes and Slaughter to the Texas Trunk Railroad Company and known as the 25-acre tract.

Defendants next offered in evidence the following instrument:

Admission and Disclaimer of Plaintiffs.

In the District Court of Dallas County, Texas, for the Forty-fourth Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs in the above numbered and entitled cause disclaim and admit that they have no title to the railroad commonly known as the Texas Trunk railroad embracing the ground actually occupied by its tracks and structures used for railroad purposes and a right of way fifty feet in width on each side of the center of its main tracks as constructed on the 25-acre tract of land in the city of Dallas deeded to the Texas Trunk Railroad Company by Hughes and Slaughter by deed recorded in the records of deeds of Dallas
191 county, volume 50, page 163, and embracing also a right of way through the town of Kemp, as shown on a map of said town recorded in Kaufman County records of deeds, volume 48, page 241, and through the town of Crandall, as shown by the map of said town recorded in the records of deeds of Kaufman county, volume 48, page 241, and embracing also a right of way 100 feet in width on each side of the center of the main track of the said railroad where it may cross any of the other lands involved in this suit.

DICKSON & MORONEY,
Attorneys for Plaintiff.

June 10, 1899.

Sundry Documents.

Defendants next introduced in evidence the following instruments mentioned in the foregoing statement of facts:

1st. The mortgage from the Texas Trunk Railroad Company to the International Trust Company of Boston, trustee.

2nd. The original amended bill of complaint of said *of said* International Trust Company in cause No. 30, International Trust Company *vs.* Texas Trunk Railroad Company on the equity docket of the United States circuit court, for the northern district of Texas, at Dallas.

3rd. Decree of foreclosure in said suit, dated January 31, 1883, foreclosing said mortgage and ordering sale of said mortgaged property. There was no decree for deficiency.

4th. Decree of the court confirming the sale under foreclosure sale to M. F. Dickenson and associates.

5th. Order of the court directing the property to be turned over to the purchasers at such sale.

In connection with the offer of said testimony, counsel for defendants stated that his contention was that the affect of said proceedings was to pass the title to the property involved in this suit to the purchasers at such sale, and that to give due effect to said foreclosure and sale & confirmation requires that the court should hold that the property involved in this suit passed to the purchasers at such sale.

Defendants next offered in evidence the following proceedings mentioned in the foregoing statement of facts:

1st. The order of said United States circuit court, making the allowance to A. S. Lathrop, special master, and directing its payment by said purchasers.

2nd. The order of sale issued by the clerk of said United States circuit court in said case, to the United States marshal, and
192 the return of the marshal*l* showing sale to J. E. Schneider and associates.

In connection with said evidence counsel for defendants stated that he claimed that the due effect of said proceedings of said Federal court was to divest title of all the property involved in this suit out of the Texas Trunk Railroad Company as originally incorporated, and to vest such title in Schneider and associates.

Defendants next offered in evidence the judgment in the case of E. M. Reardon *vs.* The Texas Trunk Railroad Company; the execution on said judgment; the sheriff's return thereon, and the sheriff's deeds thereunder, showing sales of the property therein described to J. E. Schneider and associates. Also the mortgage of the Texas Trunk Railroad Company to the Central Trust Company of New York, dated August 30, 1888.

Defendants next introduced in evidence the following proceedings:

1st. The original bill of complaint in the case of Central Trust Company of New York *vs.* Texas Trunk Railroad Company.

2nd. The order of Judge Pardee appointing Charles Dillingham as receiver, and the waiver of notice and the consent of the Texas Trunk Railroad Company filed with bill in said cause.

3rd. The order of Judge McCormick in said cause, dated September 12, 1891, directing James Moroney, receiver, W. H. Lewis, sheriff, to surrender to Charles Dillingham, receiver, the property therein mentioned.

4th. Order of court accepting Dillingham's resignation as receiver.

5th. Order appointing G. T. Atkins, receiver, and documents showing that he duly qualified as such.

6th. Bill of revivor against John H. Gaston, receiver, and the proceedings of said United States circuit court upon said bill and the cross-bill of Gaston, receiver. The final decree foreclosing said Central Trust Company mortgage, which contained no decree for deficiency, and ordering sale of said mortgaged property, and the amendment to said decree of date April 1st, 1895.

7th. Report of sale by A. T. Watts, special master commissioner, showing sale to E. H. Pardee, the order confirming said sale, and the ordders of March 16, 1896, in reference to the completion of the bid.

8th. The deed from A. T. Watts, special master commissioner, John H. Gaston, receiver, and W. T. Atkins, receiver, to E. H. Pardee.

In connection with offering evidence of the above proceedings, counsel for defendants stated that defendants claimed that the effect of said proceedings in said United States circuit court was to
193 pass title to the property involved in this suit to the defendant Edward H. Pardee.

Defendants next offered in evidence all the papers in the case of C. C. Bympas *vs.* John F. Ely *et al.*

All of said documents so offered in evidence by defendants were in due and usual form, except as otherwise stated in this statement of facts.

In view of the conte-tions of the parties respecting the effect of the decrees of the Federal court foreclosing the International Trust Company and Central Trust Company mortgages, copies of said decrees are here inserted in full, at the request of defendants, it being contended by plaintiffs that under the rules gonerning the preparation of statements of facts they have heretofore been sufficiently stated. Said decrees are as follows: Marked Exhibit "D" and Exhibit "E," respectively, attached hereto:

EXHIBIT "D."

International Trust Co. Decree.

From the Minutes of the United States Curcuit Court, Northern District of Texas, at Dallas. January Term, 1883.

INTERNATIONAL TRUST COMPANY, Trustee,
vs.
TEXAS TRUNK RAILROAD COMPANY. } No. 30.

JANUARY 31, 1883.

This cause coming on to be heard was submitted by the solactitors of the comp-ainant and of the respondent respectively, for proof, and the same having been duly considered by the court and it appearing to the satisfaction of the court that the defentant Texas Trunk Railroad Company is a private corporation chartered, organized and acting under the laws of and in the State of Texas, and by its *constating* laws is authorized to execute mortgages of its franchises and other property and that as such and in accordance with such laws the said Texas Trunk Railroad Company on the 22nd of March 1880, did execute its certain mortgage of that date to the International Trust Company, trustee &c. of Boston, Massachusetts, a private corporation chartered and organized and acting under the laws of and in the State of Massachusetts, and authorized by law to act as

trustee in deeds and mortgages for the purpose of securing
194 its bonds and the interest thereon issued under said mortgage to obtain money for constructing and equipping the railroad of said Texas Trunk Railroad Company, by which the said Texas Trunk Railroad Company granted, bargained, sold and conveyed to the said International Trust Company of Boston, Massachusetts and its successors in said trust—"all and singular the railroad as the same now is or may be hereafter, then was or might thereafter — constructed from its terminus in or near the city of Dallas, State of Texas, southeasterly through the counties of Dallas, Kaufman, Henderson, Anderson, Cherokee, Angelina, Tyler, Hardin, and Jefferson to the Gulf coast at or near Sabine pass together with a line between the State of Texas and Louisiana, in all a distance of about three hundred and fifty miles, including the right of way, road-bed, superstructure, iron, ties, splices, chains, bolts, nuts, spikes, all lands and depot grounds station-houses and depots, viaducts, bridges lumber and materials and property purchased and to be purchased for the construction and equipment of said road; all the locomotives and cars, and machinery and all kinds of rolling stock whether then owned or thereafter to be purchased by said Texas Trunk Railroad Company, and all the franchises and the rights of the said railroad company, together with all machine shops, tools, implements and including all appendages and appurtenances of said railroad, and the property of said railroad company then acquired or which might be thereafter acquired in the State of Texas used for and pertaining to the operation of said railroad, and also all the rights, title and interest which the said railroad company then had or might thereafter acquire in and to a certain portion of the lands granted to the said Texas Trunk Railroad Company by the State of Texas, that is to say fourteen out of every sixteen section of land so granted &c. And it being further shown to the satisfaction of the court that the said Texas Trunk Railroad Company did execute in due and
195 proper form its 4900 bonds under said mortgage for the sum of one thousand dollars each and bearing interest at the rate of seven per cent. per annual payable semi-annually, on the first days in May and November in each year to the International Trust Company or bearer in gold coin of the United States the said bonds being dated the 22nd day of March, 1880, and due the first day of May one thousand nine hundred and ten and having coupons for the semi-annual interest attached thereto, payable to bearer and duly signed by the treasurer of said company, and that said bonds were numbered consecutively from one to 4900 and was certified by the said International Trust Company to be one (each of them) of the series authorized to be issued by said mortgage and under the same.

And it being further shown to the court that four hundred and seventy-six of said series of bonds numbering from one to four hundred and seventy-six have been issued by the said Texas Trunk Railroad Company, and that of the said four hundred and seventy-six one hundred and fifty-two have — put upon the market and sold to *bona fide* holders and that three hundred and twenty-four of said

476 bonds have been hypothecated by said railroad company for money loaned or debts due from said company, and it being further shown to the court that the interest on a large number of said bonds due the 1st of May, 1882, was not paid by the said railroad company and that the coupons for such interest were duly presented for payment and payment for the same demanded at the agency of said railroad company on the 11th day of May, 1882, and payment thereof was refused and thereupon said coupons were protested for non-payment, and it being also shown to the court that the coupons for interest upon a large number of said bonds due 1st of November, 1882, from said railroad company has not been paid and that demand of payment was on the — days of November, 1882 and after the same were due and payable, made upon the coupons for said November interest and that payment was refused and that said coupons were thereupon protested for non-payment, and it being
196 further shown to the court that the said Texas Trunk Railroad Company is and has been insolvent for a time anterior to May 1st, 1882, and has so continued to be until this time and that it had no means or money in the city of Boston, Massachusetts or elsewhere on the 1st days of May and November, 1882, to pay the interest on said bonds or any part thereof and that it has not paid the same.

And it being further shown to the court that the said railroad company has constructed thirty-four miles of railroad and has purchased rolling stock and has established depots &c. and has been operating said railroad and that upon the executing said mortgage the one hundred and forty bonds were issued as provided therein, and that afterwards as said railroad was extended and completed and accepted by the governor of Texas that the remainder of said series of 474 were issued from time to time as provided in said mortgage and all had been issued before the 1st of January, 1882,

And it being further shown to the court that by the terms of said mortgage it is provided that in case the Texas Trunk Railroad Company fail to pay the principal or any part thereof or any of the interest on any of said bonds at any time when the same become due and payable according to the tenor thereof, and if the said default shall continue six months after the same shall have been demanded then and thereupon the principal of all of the said bonds hereby secured shall at the election of the trustee become and be immediately due and payable. * * * and that upon the written request of the holders of a majority in amount of the bonds so in default which might be at any time outstanding under said mortgage or deed of trust, that it should be the duty of said International Trust Company to foreclose said mortgage, and it being further shown to the court that the holders of 268 of said bonds, being a majority in amount of all the bonds outstanding under said mortgage on the 6th of November, 1882, presented their written request to the said International Trust Company, trustee, setting forth the demand of payment of interest on 1st May coupons, 1882, the failure of said rail-
197 road company to pay and protest thereof for non-payment, and that said default in payment of said interest had con-

tinued for more than six months after demand made, the insolvency of said railroad company and requesting that the said trustee would declare the principal of said bonds to be immediately due and payable, and that it would proceed to foreclose said mortgage, and that thereupon afterwards the said International Trust Company by its board of directors on the 22nd of November, 1882, did declare at its election the principal of all said outstanding bonds to be immediately due and payable.

And it is further shown to the court that the amount due upon the bonds of said railroad company upon bonds negotiated and sold to *bona fide* holders is one hundred and fifty-two thousand dollars and that the amount due for interest thereon at 7 per cent. per annum payable semi-annually, is thirteen thousand three hundred dollars, and that the amount due for interest on coupons due May 1st, 1882, is two hundred and seventy-nine dollars and 30/100 and the amount due for interest on coupons due November 1st, 1882, is ninety-three dollars and ten cents, and it being further shown that the amount due from said railroad company principal and interest for debts for which three hundred and twenty-four of said bonds were hypothecated as collateral security, amounts, principal and interest to one hundred and sixty-two thousand one hundred and forty-two dollars and 35/100 ($162,142–35/100) and that the whole of such indebtedness is three hundred and twenty-eight thousand eight hundred and fourteen dollars and it is thereupon ordered, adjudged and decreed that the entire bonded indebtedness of the said Texas Trunk Railroad Company is, and is hereby declared to be immediately due and payable and that the same amounts, principal and interest to this date to $328,814–75/100 three hundred and twenty-eight thousand eight hundred and fourteen dollars and seventy-five cents, and it is further ordered adjudged and decreed that the said mortgage
198 be foreclosed and that the said railroad and other property including its franchises of the said Texas Trunk Railroad Company as hereinabove set fouth and in said mortgage described be sold by the special master herein appointed on the first Tuesday in May, 1883, at public auction to the highest bidder for cash at the door of the court-house of Dallas county in the city of Dallas after having given at least sixty days' notice thereof by advertisement in some daily nuwspaper published in the city of Dallas and by advertisement at least — days in advance for 60 days in some daily newspaper published in the city of Boston, Massachusetts, at such sale the special master shall sell the land grant and the rolling stock each separately and shall sell the railroad, road-bed, right of way, depots, franchises and all other property of said railroad company (except the land grant and rolling stock) together, and upon such sale and a compliance with the terms thereof by the purchaser or purchasers, the special master shall make deeds to such purchasers for the property purchased at such sale, subject to the confirmation thereof by this court and that of the proceeds of such sale the special master shall pay the costs of advertising said sale and the remain-

der shall bring into court to be applied and distributed in accordance with the further orders of this court.

It is further ordered, adjudged and decreed:

1st. That and account be taken by the special master therein of the holders of all bonds and coupons for interest thereon issued and outstanding under said mortgage of the Texas Trunk Railroad Company, and of the amount due to each of them severally and whether such holders are *bona fide* holders for value, or whether such bonds are held as collateral an account be taken of the debt or debts for which said bonds are held as collateral, the amount of the debt when due and the rate and amount of interest on such debt or debts. That for this purpose therein that the special master give notice of the time and place of taking such account for at least sixty days
199 by advertisement in a daily newspaper published in the city of Dallas, Texas, and give notice by mail to parties holding such bonds or claiming so to do, so far as he may be advised, of any such holders of bonds and their residences.

2nd. That the special master herein upon proper notice of time and place by advertisement in some daily newspaper published in the city of Dallas and in such other manner as he may think proper, shall summon all persons having claims against the Texas Trunk Railroad Company for wages due them for work and labor done upon or in operating the railroad of said Texas Trunk Railroad Company, for which a laborer's lien is claimed, and all persons having or owning labor-lien claims against said railroad to some before him at the time and place appointed by him and establish such labor liens, and the said special master shall also give due notice to the Texas Trunk Railroad Company and to the complainant in this cause and the special master shall hear testimony and investigate and determine such liens, the names of the parties and the amounts due each and every one asserting such labor-lien claims and shall keep a record thereof and report the same with his action together with and exception to his action or rulings on the hearing by any party, to this court at its next term and upon request of counsel for either party in any controversy before him under this or under — the special master shall take down in writing so much of the evidence as may be desired and shall certify the same to this court.

3rd. That the special master shall ascertain and report what allowance shall be made to the trustee, the International Trust Company, for its services as trustee of the Texas Trunk Railroad Company in deed of trust or mortgage of 22nd of March, 1880.

That for the purpose of executing this order that the special master shall have power to administer oaths, to issue subpœnas for witnesses or commissions to take depositions, to compel the attendance of witnesses and to preserve order and decorum during his sittings and in his presence, and he may adjourn from day to day and from time to time (of which a journal shall be kept) as
200 may suit convenience and promote equity and right.

4th. That Abner S. Lathrop, Esq., be and he is hereby appointed special master herein to execute this decree and he shall take an oath in writing and file the same with the clerk of this court,

faithfully to discharge the duties devolving on him as special master in this cause to the best of his knowledge and ability.

5th. That the sale of the land grant hereinabove ordered shall be for cash and the same shall be paid for in money. That as to the other property herein directed to be sold the purchaser or purchasers thereof may pay in bonds of the said railroad company negotiated and sold in the market and held by *bone fide* purchasers the amount to which such bonds would be entitled out of the proceeds of such sale and in bond- held as collateral the amount to which the holders thereof would be entitled upon the debt for which such bond or bonds are held as collateral and the remainder, if any in money, and upon said property being struck off to any bidder at said sale the purchaser of said rolling stock shall immediately pay to the said special master the sum of two thousand dollars and deposit with him ten of said bonds or shall pay the whole sum in cash and the purchaser or purchasers of said railroad, road-bed, franchises and other property herein directed to be sold shall pay to the said special master the sum of twenty-three thousand dollars and deposit with him one hundred of said first-mortgage bonds by way of assurance of fulfillment of the purchase and further compliance with the terms of sale and in the event of a failure of any such bidder to comply with the terms aforesaid, the said special master is directed immediately and on the same day to pur- at auction and resell said property. That the owner or owners of any of the bonds produced in court on the trial of this cause and deposited with the clerk may use such bonds for the purpose of purchase at said sale, and an order or orders from the owners of such bonds upon the clerk of this court given to the special master shall be received by him as equivalent to a deposit of the amount of bonds named in the order
201 with him.

6th. That the said special master make report of his actings and doings in the premises and under the authority of this decree to this court at its next term.

It is further ordered and adjudged that the said trustee, as such, or the bondholders under said mortgage may purchase at said sale if they desire and think proper so to do.

And it further appearing to the *sia*isfaction of the court that by said mortgage it is provided as follows: that in case of any foreclosure of this mortgage whether by advertisement or otherwise all reasonable and customary trustees', attorneys', counsel and solicitors' fees shall be paid by said Texas Trunk Railroad Company and if such foreclosure shall be made by the decree of any court such solicitors', attorneys' or counsel fees as may be fixed by said court shall be added and become a part of the taxable costs of such foreclosure,

And it being further shown to the court by the testimony of attorneys and counsellors of this court that the sum of fifteen thousand dollars would be a reasonable sum for attorney, counsel and solicitors' fee- in this cause; it is ordered adjudged and decreed that the sum of fifteen thousand dollars be allowed to complainant's solicitors and that it be a part of the taxable costs of this foreclosure, said sum

to cover all solicitors', attorney and counsel fees, incurred or to be incurred during the whole progress of the proceedings for foreclosure.

EXHIBIT "E."

Central Trust Co. Decree.

In the Circuit Court of the United States for the Northern District of Texas, Sitting at Dallas.

CENTRAL TRUST COMPANY OF NEW YORK, Complainant,
vs.
JOHN H. GASTON, Receiver of the Texas Trunk Railroad Company, Defendant. } No. 193. In Equity.

This cause came on to be heard at this term upon the bill of complaint of the complainant, and the decree *pro confesso* against the Texas Trunk Railroad Company, and the bill of revivor of the complainant against John H. Gaston, as receiver of the Texas Trunk Railroad Company, and the plea of the said John H. Gaston, as such receiver, to said bill of revivor and the decrees overruling such plea, and directing that this cause be revived in accordance with the prayer of the bill of revivor, and the decree *pro confesso* against John H. Gaston, as receiver, and upon all the pleadings, papers and proceedings herein, and was argued by counsel, and thereupon, upon consideration thereof it was

Ordered, adjudged and decreed as follows, to wit,

The court finds that the material allegations of the bill of complaint of the Central Trust Company of New York are true; that on and prior to the 30th day of August, 1888, the Texas Trunk Railroad Company (hereinafter for brevity called the railroad company) was a corporation created, organized and existing under the laws of the State of Texas, and continued to be such a corporation until about the 15th day of January, 1892, when said corporation was dissolved, as hereinafter mentioned, and said railroad company was authorized to construct and operate a railroad between the points as hereinafter described, and had full power and authority to execute and deliver the mortgage hereinafter mentioned to the complainant as trustee; that on or about the said 30th day of August, 1888, said railroad company, pursuance to the power and authority by it in that behalf possessed, and due corporate action having first been had, for the purpose of raising money to construct, improve, and complete and operate its railroad, and for other lawful uses and purposes, resolved and determined to issue its 1000 bonds for $1000 each, to bear date the 30th day of August, 1888, and by each of said bonds said railroad company, for value
203 received, acknowledged itself indebted to plaintiff or bearer in the sum of $1000, and promised to pay said sum of $1000

on the 1st day of October, 1918, at the fiscal agency of the railroad company in the city of New York, in gold coin of the United States of the then standard weight and fineness, with interest at the rate of 5 per cent. per annum, payable semi-annually on the 1st days of April and October in each year commencing April 1st, 1889, in like gold coin, upon the delivery of the coupons thereto annexed as they severally should become due, and without deduction for any tax or taxes then or thereafter to be imposed thereon by the laws of the State of Texas or of the United States for the State or national purposes.

That the defendant said railroad company thereafter duly issued, negotiated and sold, in compliance with the terms and provisions of said bonds and of the mortgage hereinafter mentioned, the entire issue of aforesaid bonds to the amount of $1,000,000.00, principal par value, and the interest warrants or coupons attached thereto, and that all said bonds are now outstanding and are valid obligations of said railroad company, and that upon each of said bonds, before the same were issued, was endorsed the certificate of complainant as trustee of the mortgage hereinafter mentioned given to secure the same, duly executed, certifying that such bond was one of the issue aforesaid.

That in order to secure the payment of the said bonds, with the interest thereon, as the same should from time to time become due and payable, at the times and in the manner expressed in the said bonds and in the mortgage hereinafter mentioned, the defendant railroad company, in the due exercise of the power and authority by it in that behalf possessed, and pursuant to the corporate action of the company to that end, did on or about the said 30th day of August, 1888, make, execute and deliver to complainant, which then was and still is a corporation duly organized and existing under the laws of the State of New York, and having full power to receive the same, and did seal with its corporate seal, its certain mortgage or deed of trust bearing date on said 30th day of August, 1888, and thereby granted, bargained, sold, aliened, conveyed, transferred and set over unto complainant and its successors and assigns, the following-described property and premises, viz: the railroad already constructed and to be constructed of the Texas Trunk Railroad Company, situated in the counties of Dallas and Kaufman, in the State of Texas, extending from the city of Dallas, in said county of Dallas, to Cedar station in said county of Kaufman, consisting of

a main line upwards of fifty miles in length, and also all
204 rights of way, tracks, side tracks, ties, rails, culverts, bridges,
stations, water tanks, depots, car-houses, engine-houses, machine shops, structures, rolling stock, locomotives, cars, tenders, machinery, implements, iron, materials, lands, tenements, and other property, chattels, and choses in action and things pertaining to said railroad, owned or to be owned by said railroad company, or used or acquired or to be used or acquired by said railroad company, in and for the construction, repairs, renewal, improvement, completion, operation or management of the said railroad and together with all the chartered and corporate rights, privileges and franchises then

possessed or which should thereafter be acquired by the railroad company, including the franchise to be a corporation, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and also all the right, estate, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity or otherwise howsoever of the said railroad company of, in and to the same and every part thereof.

That on the 1st day of April, 1889, the holders of said bonds then outstanding to the amount of $400,000, issued and negotiated as aforesaid, and secured by said mortgage or deed of trust dated August, 30, 1888, and of the coupons annexed to said bonds, were entitled to collect and receive from the defendant railroad company the interest falling due on said 1st day of April, 1889, being the semi-annual interest on each of said bonds; that demand was duly made by the holders and owners of a large number of said bonds for payment of the interest falling due thereon on said last-mentioned day, and that the coupons for interest due on that day were duly presented and payment thereof demanded in the manner provided and prescribed in and by the terms of said coupons and mortgage, said demand of payment of such coupons being accompanied by an offer to surrender the same; that said defendant railroad company made default in payment of the coupons for interest falling due on 1st day of April, 1889, according to the tenor and effect of said bonds and coupons, and said semi-annual installment of interest and said coupons remain wholly due, owing and unpaid. That thereby default was made in the performance by the defendant railroad company of the terms and conditions of said bonds and of said mortgage, and the conditions thereof became and were broken. That like default was made in the payment of the semi-annual install-
205 ment of interest which became due on $400,000, of said bonds on Oct. 1st, 1889. That like default was made in the payment of the several semi-annual installments of interest for the entire issue of $1,00,000, of bonds falling due respectively on April 1, 1890; October 1, 1890; April 1, 1891; October 1, 1891; April 1, 1892; October 1, 1892; April 1, 1893; October 1, 1893; April 1, 1894; October 1, 1894.

That in and by said mortgage or deed of trust it is expressly provided and agreed that in the event of any sale of the railroad and premises, thereby conveyed under a judgment or decree of a court of competent jurisdiction, the whole principal sum of each *of* all the bonds then outstanding and unpaid and thereby secured shall thereupon forthwith become due and payable.

That said property covered by said mortgage consists of a line of railway, with the appurtenances, and it is for the interest of all parties that it should be sold as an entirety, and the value of it in portions and sections is and will be much less than its value as a whole, and that the said mortgages premises are so situated that the same cannot be sold in seoarate parcels without great and irreparable loss and sacrifice.

That the amount of the interest upon said bonds secured by said mortgage or deed of trust, dated August 30, 1888, which is in default and is now due and payable, is as follows:

Interest due April 1, 1889	$10,000.00
Interest thereon to date of this decree	2,950.38
Interest due October 1, 1889	10,000.00
Interest thereon to date of this decree	2,701.35
Interest due April 1, 1890	25,000.00
Interest thereon to date of this decree	6,148.46
Interest due October 1, 1890	25,000.00
Interest thereon to date of this decree	5,505.46
Interest due April 1, 1891	25,000.00
Interest thereon to date of this decree	4,878.46
Interest due October 1, 1891	25,000.00
Interest thereon to date of this decree	4,253.46
Interest due April 1, 1892	25,000.00
Interest thereon to date of this decree	3,628.46
Interest due October 1, 1892	25,000.00
Interest thereon to date of this decree	3,003.46
Interest due April 1, 1893	25,000.00
Interest thereon to date of this decree	2,378.46
206 Interest due October 1, 1893	25,000.00
Interest thereon to date of this decree	1,753.46
Interest due April 1, 1894	25,000.00
Interest thereon to date of this decree	1,128.46
Interest due October 1, 1894	25,000.00
Interest thereon to date of this decree	503.46
Total	$308,814.33

That by the terms of said mortgage the whole principal sum of each of the bonds outstanding and unpaid and secured by said mortgage will become due and payable upon the sale of the railroad and premises considered by said mortgage or deed of trust hereinafter directed to be made in and by this decree; that after the filing of this bill of complaint in this cause, in a certain suit or proceeding by petition or information in the nature of *quo warranto* in the name and on behalf of the State of Texas, by its attorney general, against the Texas Trunk Railroad Company, which proceeding was borught in the district court of the State of Texas, in and for Ellis county, an order or decree was made on or about the 14th day of September, 1891, dissolving the Texas Trunk Railroad Company and forfeiting its charter and franchises, and appointing John H. Gaston, receiver of all the property and effects of the Texas Trunk Railroad Company, which order was subsequently on January 15th, 1892, affirmed by the supreme court of the State of Texas, the effect of which affirmance being to dissolve said corporation on said 15th day of January, 1892, and thereafter this cause was duly revived in favor of complainant against said John H. Gaston as such receiver.

It is therefore considered, adjudged and decreed that the Texas

Trunk Railroad Company or its successors, or John H. Gaston, as receiver of the Texas Trunk Railroad Company, shall within thirty days of the entry of this decree pay or cause to be paid to the complainant, or to the clerk of this court, for the use and benefit of the holders of the bonds secured by said mortgage, dated August 30, 1888, and of the unpaid interest warrants or coupons appertaining thereto, the sum of three hundred and eight thousand, eight hundred and fourteen and thirty-three one-hundredths dollars ($308,814.33) in gold coin of the United States, with interest thereon from the date of this decree to the date of payment, and also the costs of suit to be taxed in this cause; and it is further

Ordered, adjudged and decreed that unless the said payment as hereinbefore directed shall be made within the time directed
207 as aforesaid, the said mortgage dated August 30, 1888, be foreclosed, and all property, rights or interest conveyed thereby, and upon which said mortgage is a lien, as the said property is herein particularly described, be sold as hereinafter directed, and that under and by said sale all equity of redemption of the defendant, as well as of any and all persons represented by any of the parties to this suit, of, in and to the said mortgaged premises, property rights and franchises, and every part and parcel thereof, embraced or included, or intended to be, in the said mortgage be foreclosed and cut off and forever barred; and it is further

Ordered, adjudged and decreed that unless the said payment as hereinbefore directed, shall be made within the time directed, as aforesaid, the property covered by said mortgage shall be sold without valuation, appraisement, redemption or extension, as an entirety and not in separate parcels, to the highest and best bidders at public auction, at the court-house door of the county of Dallas, which is the county where the principal office of the railroad company is situated, on the first Tuesday of the month, between the hours of ten o'clock a. m. and four o'clock p. m., after first giving ninety days' notice of such sale by publication to be made once in each week in at least one newspaper printed and regularly issued, and having a general circulation in each of the counties of Dallas and Kaufman, and in at least one daily newspaper published in the cities of Dallas and New York, respectively, on a day to be fixed by the special master commissioner herein appointed in his advertisement of sale. Such notice shall be by brief general advertisement referring to this decree for further particulars and for a more specific description of the property herein ordered to be sold. The special master commissioner may, at the request of the complainant, or for a good cause shown at the time and place appointed, as aforesaid, and thereafter at the same place from time to time, by announcement to the bystanders, adjourn or postpone said sale, then and there stating the time to which said sale is this adjourned or postponed, and may, without further notice, proceed with said sale at any date to which the same may have been thus adjourned. Said special master commissioner may give such further notice of sale in addition to the notice above described as the complainant may request.

Any holder of any of the said bonds may bid and purchase at

said sale for his own account. The said special master commissioner shall receive no bid on said sale for less than $250,000, unless hereafter otherwise ordered by the court, nor shall he receive
208 any bid from any person offering to bid who shall not first deposit with him as a pledge that such bidder will make good his bid in case of its acceptance the sum of $10,000, in money, or by a certified check on some responsible bank. Of the price for which said property shall be sold there shall be paid in cash at the time of the sale the cash deposit hereinbefore required, which shall — received as part of the purchase price, and also at the same time and from time to time thereafter, such further portions of said price shall be paid in cash as the court may direct. The court reserves the right to reject any bid and take and resell said premises upon failure of any purchaser for twenty days to comply with any order of the court requiring payment. The balance of the purchase price not now or hereafter required to be paid in cash may either be paid in cash or the purchaser may satisfy and make good said balance of his bid in the whole or in part by paying over and surrendering receiver's certificates issued by the order of the court in this cause, or outstanding bonds and overdue coupons, or either, secured by said mortgage dated August 30, 1888; such certificates, bonds and coupons respectively, being received at such price or value as shall be equivalent to the amount that the holders thereof would be entitled to receive thereon in case the entire purchase price were paid in cash. All certificates, bonds and coupons, that may be used to make such payment, shall be surrendered to the special master commissioner and cancelled, if the whole amount due thereon is applied upon the purchase price, but if less than such whole amount is applied, then the amount so applied shall be stamped or written upon said certificates, bonds or coupons by said special master commissioner and such bonds or coupons shall then be returned to the holder.

As soon as any sale or sales shall be made — said special master commissioner in pursuance of this decree, he shall report the same to this court for confirmation, further certifying to the court compliance by the purchaser or purchasers with the conditions of sale as hereinbefore prescribed. If any bid shall be accepted by the court, and the person making the same shall fail to comply with all the conditions of sale and all orders of the court with respect thereto, the sum deposited by the bidder shall be forfeited and shall be applied as the court may direct.

All claims for allowance in this suit and payment out of the proceeds of sale, or any fund in the court in this cause, not hereinbefore presented by intervention or petition to the court within such time and after publication of such notice as shall be fixed by the court in the decree confirming the sale herein ordered, or by other
209 order hereinbefore made, and any claims which shall not be presented for allowance within such time so fixed, shall not be enforc-able herein or against the proceeds of sale or any funds in the court in this cause.

It is further ordered, adjudged and decreed that the fund arising

from the sale shall be applied in the following order of priority, but no *pro rata* as to the amounts included in each of the following subdivisions, respectively: that is to say:

First. To the payment of the costs of this suit, including compensation of the receiver herein and his solicitor, the special master in chancery herein, and the special master commissioner making the sale hereby decreed, and to the defendant John H. Gaston, receiver, and his solicitors and counsel; such compensation to be hereafter fixed by the court, and also the costs and expenses of making said sale.

Second. To the payment of the receiver's certificates issued under the orders of this court in this cause, and all debts of thre receiver herein, including all just claims accruing against said receiver in the operation and management of the property herein decreed to be sold, as have been heretofore or shall be hereafter by the court in this cause determined and established as such, on presentation of the same as hereinbefore provided.

Third. To the payment of the compensation of the complainant herein for its services, charges and expenses in the execution of its trust, and to be allowed by the court, and such proper allowances as the court may make for the fees and disbursements of the solicitors and counsel of said complainant.

Fourth. To the payment of claims for wages due for work and labor performed by mechanics, laborers and operatives with tools, teams, or otherwise in the construction, operation and repair of the railroad and equipment thereof described in the mortgage hereby foreclosed, and such other claims if any as the court has heretof-re determined or may hereafter determine, or interventions filed as hereinbefore provided, to be entitled to the payment out of the proceeds of said sale prior to the said outstanding bonds and coupons thereunto appertaining.

Fifth. To the payment of the interest and principal of said bonds secured by said mortgage of August 30, 1888, and the coupons thereunto appertaining, with interest thereon to date of payment.

Should there be any surplus remaining after making the payments above directed the same shall be paid into the registry
210 of this court to abide such order or decree as the court may make in respect thereto.

It is further ordered, adjudged and decreed that A. T. Watts be, and he is hereby appointed special master commissioner to execute this decree, and upon confirmation of the sale hereby directed, to make, execution and deliver to the purchaser or purchasers thereof a deed or deeds to the property sold, and at the time of the execution of said deed or deeds the receiver appointed in this suit shall make, execute and deliver to the said purchaser or purchasers good and sufficient deeds of conveyance or evidence of transfer of any or all property sold, which is ve-ted in or standing in the name of said receiver, or to which said receiver has in any manner acquired title, and upon confirmation of said sale or sales, and full compliance therewith by the purchaser or purchasers, he or they shall be entitled to a deed or deeds of assurance to be executed according to

law by John H. Gaston, receiver of the Texas Trunk Railroad Company.

It is further ordered, adjudged and decreed that the purchaser or purchasers of the property herein decreed to be sold shall be invested with and shall hold, possess and enjoy the said mortgaged premises and property herein decreed to be sold, and all the rights, privileges and franchises appertaining thereto, as fully and completely as the said Texas Trunk Railroad Company, or the said John H. Gaston receiver, has at any time held or enjoyed the same; and further that the said purchaser or purchasers shall have and be entitled to hol- said railroads and property free and discharged of and from the lien of the mortgage foreclosed as herein mentioned, and from the claims of the parties to this suit, or either of them, or any intervenors herein, or any persons claiming or to claim thereunder.

All questions not hereby disposed of and determined, including the discharge of the receiver and the approving of his accounts, are hereby reserved for further adjudication, their settlement being held not necessary for the purpose of this decree; and the court reserves the right to make such further orders or decrees at the foot of this decree as may be just and proper.

February 26th, 1895.

(Signed) A. P. McCORMICK,
Circuit Judge.

We hereby agree that the above and foregoing is a full true and correct statement of the facts proved and evidence introduced on the trial of said cause, and that the plaintiffs' bills of exceptions therein set forth are correct.

211 DICKSON & MORONEY,
Attorneys for Plaintiff-.
BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Defendants.

I hereby approve the foregoing statement of facts as correct and allow the bills of exceptions of plaintiffs therein contained, this the 27th day of July, 1899.

JOHN M. AVERY,
Special Judge, Presiding.

Filed July 27, 1899.
H. W. JONES,
Clk Dist. Court, Dallas Co.

Opinion of the Court.

Filed July 29th, 1899.

In District Court of Dallas County.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17141.

Statement.

This is an action of trespass to try title in the usual form, brought by the plaintiffs to recover of the defendants several tracts of land, among which are a 25-acre tract in the city of Dallas (hereafter called the Hughes and Slaughter tract) a 11 92/100-acre tract, about one mile south of Dallas (hereafter called the Mays tract), two other tracts in Dallas county amounting to 30 acres, a tract in Houston county amounting to 215 acres, twelve tracts in Kaufman county, amounting to about 507 acres and 65 town lots in the towns of Kemp and Crandall, in Kaufman county, less the right of way 200 feet wide, of the Texas Trunk railroad over such land as the railroad crosses. The defendants pleaded not guilty, and three, five and ten years' statute of limitation.

Most of the facts are agreed upon and undisputed. The Texas Trunk Railroad Company (hereinafter called company No. 1) is the common source of title. The company was chartered in *October, 1879*, with the usual charter powers of railroad companies, and was authorized to build a railroad, beginning at the city of Dallas, and extending through Dallas, Kaufman, *Houston* and other counties some 350 miles to Sabine pass, with a branch to the State line of Louisiana.

On March 22nd, 1880, this company executed a mortgage to the International Trust Company, trustee, to secure an issue of bonds,
which was duly recorded. The property conveyed in that
212 mortgage, omitting the parts as to all the locomotives and
other personal property, is substantially described as follows: "All and singular the railroad of party of the first part as the same now is or may hereafter be constructed from its terminus, in or near the city of Dallas, southeastwardly about 350 miles to the Gulf coast at or near Sabine pass, and including the right of way, road-bed, superstructure etc. and all lands and depot grounds, station-houses, depots and all materials and property purchased or to be purchased, for the construction and equipment of said road, and all of the franchises and rights of the party of the first part, and including all appurtenances and appendages of said railroad, and the property of said company now acquired, or which may be required in the State of Texas, used for and pertaining to the operation of said railroad."

On January 31st, 1883, at the instance of said trustee, this mortgage was foreclosed in the Federal court, at Dallas, Texas. This de-

cree of foreclosure recites the giving of the mortgage etc., and orders the property sold. The description of the property in the decree is the same as in the mortgage. Under this decree the property was first sold to Dickerson *et al.*, June 6th, 1883, who organized a second Texas Trunk Railroad Company (hereinafter called company No. 2). But these purchasers having failed to comply with the decree as to the payment of certain debts, the court resumed control of the property, and it was again sold under orders of the court to Schneider *et al.*, and this sale was confirmed and deed made to them in 1885, with same description.

The last board of directors of Texas Trunk Railroad Company No. 1, consisted of nine persons, amongst whom were W. L. Cabell, J. B. Simpson and D. A. Robinson and John F. Ely.

Schneider *et al.* organized a third Texas Trunk Railroad Company (hereinafter called company No. 3). And all of the property bought passed to that company. On the 30 day of August, 1888, this company No. 3 executed a mortgage to the Cenyral Trust Company, trustee, to secure an issue of bonds which was duly recorded. The property conveyed by this mortgage, omitting the parts as to all the locomotives and other personal property, is substantially described as follows: "The railroad already constructed and to be constructed of the party of the first part, situate in the counties of Dallas and Kaufman, in the State of Texas, extending from the city of Dallas, in said county of Dallas, to Cedar station in said county of Kaufman, consisting of a main line upwards of fifty miles in length and also all the rights of way, tracks, side tracks, ties, stations,
213 depots, car-houses, engine-houses, structures, materials, lands, tenements and other property and things pertaining to said railroad, owned or to be owned by said party of the first part, or used or acquired, or to be used or acquired by said party of the first part, in and for the construction, repairs, renewal, improvements, completions, operation or management of said railroad, and together with all the charters and corporate rights, privileges and franchises now possessed, or which shall hereafter be acquired by the party of the first part, including the franchise to be a corporation, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and also all the right, estate, title, interest, property, possession, claim and demand, whatever, as well in law as in equity, or otherwise howsoever of the said party of the first part of, in and to the same, and every part thereof."

On September 4th, 1891, the Central Trust Company, trustee, brought suit in the Federal court at Dallas, Texas, to foreclose this mortgage, and a receiver was appointed for the property. On February 26th, 1895, a decree was entered in this suit reciting the giving of the mortgage etc. and foreclosing it and ordering the property sold. This decree contains the same description of the property as the mortgage. Under this decree the property was sold to the defendants and sale confirmed March 16th, 1896, and deed made containing substantially the same description. This receiver,

however, has never been discharged, and is still operating the railroad.

In the meantime the State of Texas had brought suit in the State court to forfeit the charter of the Texas Trunk railroad, and in that suit, on September 14th, 1891, a forfeiture was adjudged, and John H. Gaston was appointed receiver of the property of the railroad, and qualified and has never been discharged, but has never obtained actual possession of any of the property (see Texas Trunk Railroad *vs.* State, 83rd Texas, 1). In 1881, one Thompson had sued in the State court the Texas Trunk Railroad Company No. 1 for debt. In 1887 he recovered a judgment for his debt. This judgment recites that it was suggested to the court that the Texas Trunk Railroad Company had been dissolved by a sale of its property, franchises etc. (For certain facts connected with this judgment etc., see Texas Trunk R. R. Co. *vs.* Lewis, sheriff, 81st Texas, 1.) Under an execution issued on this judgment in 1895, the property involved herein, lying in Dallas county, was sold and plaintiffs claim under this purchaser. Certain parties had obtained a judgment in the
214 State court against Texas Trunk Railroad Company No. 1 before it was sold out, and after it was sold out executions were issued thereon and under *it* the 25-acre Hughes and Slaughter tract and the 11 92/100-acre Mays tract were sold to one Powell and defendants claim title under this purchase also, in addition to their claims under the above mortgages and foreclosures.

In 1895, the grantor of plaintiffs brought suit in the State court for all of the property involved herein against W. L. Cabell, J. B. Simpson, D. A. Robinson and John F. Ely, and three others, as the surviving directors or trustees of the Texas Trunk Railroad Company No. 1, and John H. Gaston as receiver appointed in the forfeiture suit, and recovered judgment April 7th, 1898, for the property involved herein, but neither the defendants herein, nor the receiver of the Federal court was a party to this suit. Plaintiff also claims under a deed dated December 25th, 1897, for the property involved herein, from W. L. Cabell, J. B. Simpson, D. A. Robinson and John F. Ely, who were the surviving directors or trustees of the old company No. 1. This deed was made for the benefit of all the creditors of said company.

The case at bar was submitted to the jury on special issues and from these issues, and the undisputed evidence, the following facts, as — the Hughes and Slaughter 25-acre tract and the Mays 11 92/100-acre tract appear, viz: The 25-acre tract is about 650 by 1700 feet, and was bought by the Texas Trunk Railroad Company for railroad purposes from Hughes and Slaughter. The deed is dated March 8th, 1880, but was not delivered until several months thereafter, but during the year 1880. At the time it was purchased it was the purpose and intention of the railroad company and its officers to construct on it the main tract of said railroad company, and *and* part of the sheds of the said railroad company, and whatever switches and side tracks should be necessary in the operation of the railroad, and if these did not occupy all of the land then to sell lots on the eastern side of the land to its employees so that they might

be near their work. No such sales have ever been made, nor has any part of the land been subdivided into lots. The railroad company built its main track lengthwise across the land near the western boundary, and also built a side track on it and a Y near the center of it and extending eastwardly beyond the center of the land, and also a small house, used as a ticket office and car shed. It used in the operation of its road up to 1892 the main and side tracks and houses. This was the only land it owned in Dallas where it terminated. Both as originally contemplated and as actually constructed, if the road had been properly constructed and operated it
215 would have needed as much — 25 acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purposes of such construction and operation.

The 11 92/100-acre tract is about 600 by 900 feet and was bought by the Texas Trunk Railroad Company for railroad purposes from Mays and wife on February 2nd, 1881. It has on it sand. At the time it was purchased it was the purpose and intention of the railroad company and its officers to use the sand in the construction and ballasting of the road-bed, and also to place on it such switches and side tracks as might be necessary in the operation of the road. The main track of the railroad was built across it lengthwise, near the eastern boundary, and also a spur track running out from the main track, but near to it, across the land so as to reach the sand, and sand has since been taken from the land and used in the construction and repairing and bal-assting said road. The road has thus occupied about two acres of the tract. If the road were properly constructed and operated, it would be necessary to use sand in order to do so properly and successfully, and all of this tract would be necessary and required for these purposes.

All the other lands sued for were donations to the Texas Trunk Railroad Company No. 1. Two of these tracts were cut up into town lots for sale in the towns of Kemp and Crandall, and the other tracts were used for farming purposes, and most of them lay several miles from the railroad. There was no evidence that they had been in any way used for railroad purposes except in so far as one or two were occupied by the right of way of the railroad company.

The court rendered judgment in favor of the defendants for the Hughes and Slaughter tract of 25 acres and the Mays 11 92/100-acre tract, and for the plaintiffs for the other lands sued for, less a 200-foot right of way over such of them as were crossed by the said Texas Trunk Railroad Company. From this judgment both parties appealed.

This case involved a history and review since 1879 of the Texas Trunk railway and its litigations and operations, and there are many more facts in the record which it is not deemed necessary to detail in view of the conclusion at which the court arrived as to the law.

Opinion.

On the above facts the first question of law presented is: What part of the land involved herein was covered by the first mortgage, dated March 22nd, 1880, given to the International Trust
216 Company, trustee? The plaintiffs contended that, under these facts, this mortgage only covered the right of way of the Texas Trunk Railroad Company over all of the land and no more. The defendants contended that this mortgage covered all of the land, but if this contention is not sound, then that it covered at least the Hughes and Slaughter 25-acre tract and the Mays 11 92/100-acre tract. In deciding this question, in my opinion, we may consider the circumstances of the parties, the way in which and the purpose for which the properties were acquired, and the uses to which they may have been and may be put, etc. No case has been called to my attention which exactly fits or is decisive of the case at bar. The governing rule is clear enough, but the difficulty arises in applying it to the particular language and facts in each case.

In Humphreys *vs.* McKissock, 140 U. S., 304, it was held that the term "appurtenances" in such a mortgage did not cover an interest in an elevator situated over a half a mile from the track, on land not owned by the railroad company, and which could only be reached by crossing the track of another company, and the court further said that strictly speaking land could not be appurtenant to land. In construing a somewhat similar mortgage in N. O. P. R. Co. *vs.* Parker, 143 U. S., 42, it was held that a land grant from the Government was not covered, and cases were cited with approval holding that such mortgage did not cover "a hotel and brick storehouse, some vacant lots and a farm of three hundred acres." In that case it was also said: "In a strict legal sense it is said that land can never be appurtenant to land; but it is evidently contemplated by this mortgage that real estate, as well as personal property subsequently acquired, such as land for stations, machine shops, or other purposes immediately connected with the road, pass under the lien of the mortgage."

In Schaub *vs.* Brewing Co., 80th Texas 634, it was held that beer kegs were covered by a mortgage of a brewery and its "accessories appliances and appurtenances." In Shirley *vs.* R'y Co., 78th Texas, 146, it was said that such a mortgage did not cover a land grant or town lots not used by the railroad, or a tract of woodland seven miles from the road. In R'y Co. *vs.* Whitaker, 68th Texas, 630, the court held that a somewhat similar mortgage did not cover a residence house and lot in a city which had been acquired in settlement of a lawsuit for damages, and which had been generally rented out for residence purposes, but the court also used this language: "In our opinion this mortgage not only embraced such real estate of the company as was necessary to carry on its business, but also such as was necessary to the convenient and commodious operation of its lines of road."

217 In Railroad Company *vs.* Moffett, 94th Mo. 60, it is said: "Land ordinarily cannot be appurtenant to other lands or dis-

tinct parcel or pass with it as a part of or belonging to it, but here it is all one contig-ous or adjacent piece given and donated to the railroad in one and the same instrument. The word 'appurtenant' had no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted." To the same effect is American and English Ency. of Law (2nd ed.) vol. 2, page 528.

From the above authorities, it seems clear that this mortgage did not cover any of the lands sued for, except the 25-acre Hughes and Slaughter tract and the 11 92/100-acre Mays tract. The plaintiffs contended that the same rule applies and the same conclusion should be reached as to these two tracts as to the other lands. But it seems to be that the facts are so different as to compel a different conclusion. The other tracts were donations. These two tracts were bought and paid for by the railroad company, and were the only lands thus bought. The other lands were donated for no specific purpose; these two tracts were bought for railroad purposes, and it was the intention to use the 25-acre tract so far as necessary, for switches, sheds, etc. and the 11 92/100-acre tract for obtaining sand for the construction and ba-assting of the road, and for switches, so far as necessary. Most of the other land lies some distance from the railroad. These two tracts are long narrow ones and lie immediately contig-ous and adjacent to the road and the main track and switches are built over them lengthwise. The other land has in no way been used for railroad purposes, but it is farm land and town lots. These two tracts have never been cut up into town lots or used for farms, but the only use to which they have been put has been for railroad purposes. These two tracts are at and near the terminal of said road, the main track and switches are built over them; a ticket office, part of a shed, or round-house, and a Y extending past the center have been put on the 25-acre tract. About 2 acres of the 11 92/100-acre tract has been used for obtaining sand for the railroad. The other tracts are not essential to the proper operation of the road. These two tracts are the only lands owned by the railroad company in or near Dallas, its terminal point, and if the road was properly constructed and operated, these two tracts would be essential and necessary to its construction and operation.

I therefore think, under the facts in this case, that these two tracts come fairly within the general words of description used in
218 the mortgage. The general rule of construction is that all the words of a written instrument should be given some effect where the evidence will warrant this (Hancock *vs.* Butler, 21st Texas, 806). Under the facts of this case the practical effect of plaintiffs' contention is to confine the operation of this mortgage simple to the land actually occupied by the tracts of the railroad. But if we adopt this construction no effect will be given to those general words and they will be treated as surplusage because the mortgage expressly mentions the right of way, tracks, depots, station-houses etc., and then uses these general words. I am of the opinion that this mortgage not only embraced such real estate of the company as was necessary to carry on its business, but also such as was

necessary, usual or proper to the convenient and com-odious operation and construction of the railroad, and therefore covered these two tracts, (Railroad Company *vs.* Whitaker, *supra*).

The decree foreclosing this mortgage and the sale thereunder recited its existence, and described the property in the same language as the mortgage and was an equitable foreclosure and sale and was not simply an execution sale. The plaintiffs in this case occupy no different or higher position than the mortgagor. In my opinion these proceedings conveyed these two tracts to Schneider *et al.*, and they conveyed them to Company No. 3. The mortgage given by Company No. 3 to Central Trust Company used language equally as broad as the first mortgage above discussed. It seems clear that the intention was to cover by the second mortgage all the property acquired by the foreclosure of the first mortgage, and the circumstances and uses of these two tracts had not materially changed. By the foreclosure of this second mortgage and the sale thereunder these two tracts passed to defendants for the same reasons given in discussing the first mortgage.

But defendants contend that even if the other lands, outside of these two tracts, was not covered by these mortgages, and if defendants have no title to them, still the plaintiff- have shown no right to recover them. This is based on the proposition that the last board of directors of the original Texas Trunk Railroad Company No. 1 consisted of nine persons, five of whom have since died, and that the survivors could not sue or be sued, or convey the property, or do any other act after such death of one or more of them.

Our statute (Art. 4555 R. S. 1895), in force at that time, and ever since, provides in substance that, when a railroad company
219 was sold out, as therein provided, "the directors or managers of the sold-out company at the time of the sale, by whatever name they may be known in law, should be the trustees of the creditors and stockholders of the sold-out company, and shall have full power to settle the affairs of the sold-out company, collect and pay the outstanding debts and divide amongst the stockholders the money and other property that should remain after payment of the debts and other necessary expenses, and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold-out company, and may be sued as such."

In discussing the question of the right of survivors to execute powers, in Johnson *vs.* Bowden, 43rd Texas, 672, the court says: "First, that when a power is given to two or more by their proper names, who are not made executors, it will not survive without express words. Second, that when it is given to three or more generally, as to my trustees, my sons etc. and not by their proper names, the authority will survive whilst the plural number remains." Again on page 673 the court says: "But when the power is conferred on the trustees as a class and not by name, then the power will be continued as long as there are more than one by whom it may be executed, although no words of survivorship be added." To the same effect is Perry on Trustees, sec. 343.

The purpose of this estate seems to be that these trustees should

wind up the affairs of the sold-out company, independent of the courts and as expeditiously and economically as practicable, and give them a wide discretion as to the manner of doing so. Probably in nine cases out of ten some of the trustees would die before this could be accomplished. In the case at bar five of them have died. To sustain the contention of defendants would probably defeat the intention of the statute in most cases. I am of the opinion that this power falls within the second class mentioned by the court above, and that it passed to the surviving trustees, and that the four survivors in this case could exercise all the powers conferred by this statute.

In the case at bar, the grantors of plaintiffs had recovered a judgment for all these lands in the State court against those four surviving trustees, and also against John H. Gaston, the receiver appointed in the forfeiture suit. This appears to have been a friendly suit, so far as these survivors were concerned. These four survivors have also deeded these lands to the grantor of plaintiffs who sue as trustees of and for the benefit of all the creditors of the sold-
220 out company, and this suit is prosecuted with the consent of these survivors, two of whom testified on behalf of plaintiffs on the trial. It thus appears that this suit is in substance and effect the same as if brought by and in the name of these four survivors. I think that no one can object to this arrangement, except possibly the stockholders or creditors of the sold-out company, who are making no objection, and that defendants cannot defeat plaintiffs' title on this ground, but that plaintiffs are entitled to recover all that the original trustees of the sold-out company, or John H. Gaston, receiver, could have recovered. (Quinlan *vs.* H. & T. C. R. R., 89th Texas, 380.)

It is also contended by defendants that plaintiffs' title derived through the Thompson judgment and execution sale is void, and by the plaintiffs that the defendants' title derived through the Powell judgment, execution, sale and deed is void. Both of those contentions are based on the ground that such sales took place after the company was sold out and thus dissolved. These sales only affect the 25-acre tract and the 11 92/100-acre tract, and the mortgage under which defendants claim these two tracts was given prior to either sale. Having held that as to these two tracts that defendants' title under this mortgage was superior, it is not necessary to decide these questions.

The result is that defendants have shown title to the Hughes and Slaughter 25-acre tract and the Mays 11 92/100-acre tract, and plaintiffs have shown title to all of the other lands sued for, less the right of way over such of them as the railroad crosses, and judgment is entered accordingly.

JOHN M. AVERY,
Special Judge, Presiding.

Filed 29 day of July, A. D. 1899.
H. W. JONES,
Clerk Dist. Ct., Dallas Co., Tex.,
By CALHOUN KNOX, *Deputy.*

Plaintiffs' Appeal Bond.

Filed and Approved July 27th, 1899.

In District Court of Dallas County, Texas, Forty-fourth Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Whereas in the above entitled and numbered cause pending
221 in the district court of Dallas county, Texas, 44th judicial district, and wherein A. D. Aldridge, A. F. Hardie and W. G. Mor-ow, suing as trustees for J. E. Downes and associates, are plaintiffs, and Edward H. Pardee and Collis P. Huntington are defendants, a judgment was rendered on the 25th day of July, 1899, that said plaintiff recover of said defendants certain tracts of land in said judgment described, and that said plaintiffs take nothing by their said suit as to certain other tracts of land, in said judgment described, and that plaintiffs recover of defendants all costs of suit, which judgment is hereby referred to, and made a part hereof for greater particularity, and

Whereas A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes and associates, plaintiffs, have taken an appeal from said judgment to the court of civil appeals for the fifth supreme judicial district of Texas.

Now therefore, we, A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes and associates, as principals and —— —— and —— —— as sure*i*es, acknowledge ourselves to be held and firmly bound unto the said Edward H. Pardee and Collis P. Huntington in the sum of five hundred dollars, conditioned that said appellants, A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes and associates, shall prosecute their appeal with effect and shall pay all the costs which have accrued in the court below, and which may accrue in the court of civil appeals and supreme court.

Witness our hands this the 27th day of July, 1899.

A. D. ALDRIDGE,
A. F. HARDIE, AND
W. G. MOWRY,
Trustees for J. E. Downes and Associates,
By DICKSON & MORONEY, *Attorneys.*
JOSEPH M. DICKSON.
W. J. MORONEY.
W. H. MANSFIELD.
A. R. MAY.

I have fixed the probable amount of the costs of the suit in said cause in the court of civil appeals, supreme court and the court

below at ($225.00) two hundred and twenty-five dollars, and approve the above and foregoing bond this the 27th day of July, 1899.

H. W. JONES, *Clk.*
By H. H. WILLIAMS, *D'y.*

Plaintiffs' attorneys, Joseph M. Dickson and W. J. Moroney, have leave of court to become sureties on the above bond.

222 JOHN M. AVERY,
Special Judge, Presiding.

Filed Jul- 27, 1899.
H. W. JONES,
Clerk District Court, Dallas Co.,
By H. H. WILLIAMS, *Dep't'y.*

Defendants' Appeal Bond.

Filed and Approved July 28th, 1899.

In District Court of Dallas County, Texas, Forty-fourth Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Whereas in the above entitled and numbered cause pending in the district court of Dallas county, Texas, 44th judicial district, and wherein A. D. Aldridge, A. F. Hardie and W. G. Mowry, suing as trustees for J. E. Downes and associates, are plaintiffs, and Edward H. Pardee and Collis P. Huntington are defendants, a judgment was rendered on the 25th day of July, 1899, that said plaintiffs recover of said defendants certain tracts of land in said judgment described and that said plaintiffs take nothing by their said suit as to other tracts of land, in said judgment described, and that plaintiffs recover of defendants all costs of suit, which judgment is hereby referred to, and made a part hereof for greater particularity, and

Whereas said Edward H. Pardee and Collis P. Huntington, defendants, have taken an appeal from said judgment to the court of civil appeals for the 5th supreme judicial district of Texas.

Now therefore, we, Edward H. Pardee and Collis P. Huntington, as principals, and Andrew Dow and Geo. W. Heyer, as sureties, acknowledge ourselves to be held and firmly bound unto the said A. F. Hardie, A. D. Aldridge and W. G. Mo-ry, trustees for J. E. Downes and associates, in the sum of five hundred dollars, conditioned that said appellants, Edward H. Pardee and Collis P. Huntington shall prosecute their appeal with effect and shall pay all the costs which have accrued in the court below and which may accrue in the court of civil appeals and the supreme court.

Witness our hands this the 27th day of July, 1899.

EDWARD H. PARDEE,
COLLIS P. HUNTINGTON,
223 By BAKER, BOTTS, BAKER & LOVETT,
Their Attorneys of Record.

ANDREW DOW.
GEO. W. HEYER.

I have fixed the probable amount of the costs of the suit in said cause in the court of civil appeals, supreme court and the court below at ($225.00) two hundred and twenty-five dollars, and approve the above and foregoing bond this 28th day of July, 1899.

H. W. JONES,
Cl'k Dist. Court, Dallas Co., Tex.,
By H. H. WILLIAMS, *D'y.*

Filed July 28th, 1899.
H. W. JONES,
Cl'k Dist. Court,
By H. H. WILLIAMS, *D'p'ty.*

Plaintiffs' Assignments of Error.

Filed Aug. 9th, 1899.

In the District Court of Dallas County, Texas, 44th Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 17147.

Plaintiffs' assignments of error.

Now come plaintiffs in the above-styled cause, and show that in the trial, judgment and proceedings in said cause divers errors were committed by the court to the prejudice of plaintiffs, who now come and file the following assignment of errors:

(1.) The court erred in holding that the Hughes and Slaughter tract of land, described in subdivision (*b*) of plaintiffs' first amended original petition, other than the 100 feet on the west side thereof, was embraced in the mortgage executed by the Texas Trunk Railroad Company to the International Trust Company, of date March 22, 1880, such holding being in direct conflict with the verdict of the jury and the undisputed evidence on issues not included in the verdict.

(2.) The court erred in holding that said Hughes and Slaughter tract of land, other than the 100 feet on the e-st side thereof, was embraced in the decree of the Federal court foreclosing the International Trust Company mortgage, such holding being in direct conflict with the verdict of the jury and the undisputed evidence on the issues not included in the verdict.

(3.) The court erred in holding that the Mays tract of land, described in subdivision (*d*) of plaintiffs' first amended original petition, other than 100 feet off each side of the center of the main
224 railroad track, was embraced in said International Trust Company mortgage, such holding being in direct conflict with the verdict of the jury and the undisputed evidence on the issues not included in the verdict.

(4.) The court erred in holding that said Mays tract of land, other than the 100 feet on each side of the center of the main railroad

track, was embraced in the decree of the Federal court foreclosing the International Trust Company mortgage, such holding being in direct conflict with the verdict of the jury and the undisputed evidence on the issues not included in the verdict.

(5.) The court erred in refusing to give judgment for plaintiffs, and in giving judgment for defendants, for said Hughes and Slaughter tract of land, other than 100 feet on the west side thereof, plaintiffs being entitled to judgment for the same under the verdict of the jury and the evidence.

(6.) The court erred in refusing to give judgment for plaintiffs, and in giving judgment for defendants for said Mays tract of land, other than 100 feet on each side of the center of the main tract of the railroad, plaintiffs being entitled to judgment for the same under the verdict of the jury and evidence.

(7.) The court erred in overruling plaintiffs' motion to reform the judgment so as to give plaintiffs judgment for said Hughes and Slaughter tract of land, other than 100 feet on the west side thereof, for the reasons set forth in subdivision I of said motion.

(8.) The court erred in overruling plaintiffs' motion to reform the judgment so as to give plaintiffs judgment for said Hughes and Slaugh-er tract of land, other than the 100 feet on the west side thereof, for the reasons set forth in subdivision II of said motion.

(9.) The court erred in overruling plaintiffs' motion to reform the judgment so as to give plaintiffs judgment for said Mays tract of land, other than 100 feet on each side of the center of the main track of the railroad, for the reasons set forth in subdivision I of said motion.

(10.) The court erred in overruling plaintiffs' motion to reform the judgment so as to give plaintiffs judgment for said Mays tract of land, other than 100 feet on each side of the center of the main tract of the railroad, for the reasons set forth in subdivision II of said motion.

(11.) The court erred in instructing the jury in the court's special instruction on the Hughes & Slaughter tract to the effect: "That no
225 sales of the land have ever been made, nor has any part of the land been subdivided into lots; that the railroad built its main track across the land near its western boundary, and also built a side track on it and a Y near the center of it, and extending eastwardly across the land to beyond the center of the land, and also houses used as depots and car shed; and that it used in the operation of its road up to 1892, the main and side tracks and houses, and that this was the only land the road owned in Dallas where it terminated:" because when said road *road* was originally constructed it did not terminate in the city of Dallas and said land was not then inside the city limits; and because none of the facts recited in said instructions are substantial issues in this cause, but are at most mere evidential facts improper to be given in charge to the jury, and the charge is an improper comment on the evidence, and the evidence shows that all the railroad improvements mentioned by the court, except a portion of the Y — on land not claimed by plaintiffs and it does not appear when said Y was built.

(12.) The court erred in overruling plaintiffs' motion to set aside the finding of the jury rendered in response to said special instruction set forth in the 11th assignment of error.

(13.) The court erred in said 2nd special instruction as follows:—"Both as originally contemplated and as actually constructed, if the road had been properly constructed, and operated it would have needed as much as 25 acres for actual facilities, such as switches, shops, etc., and such would have been the usual and proper amount for such construction and operation;" because under the testimony it was for the jury to say whether or not the facts above recited were true, and the evidence did not warrant a peremptory instruction; and because said facts, if true, are not substantial issues in this case, but are at most mere evidential facts; and said charge is an improper comment on the evidence. And said matters are wholly irrelevant and misleading.

(14.) The court erred in overruling plaintiffs' motion to set aside the finding of the jury rendered in response to said special instruction set forth in 13th assignment of error.

(15.) The court erred in the third paragraph in instructing the jury as follows:—"The main track of the road was built across the Mays tract near its eastern boundary, and also a spur track running out from the main track but near to it across the land so as to reach the sand. Sand has since been taken from the land and used in the construction repairing and bal-asting the road; the road has thus occupied about two acres of the tract," because the facts above recited are not substantial issues in this cause, and are at
226 most mere evidential facts, and said charge is an improper comment on the evidence; and the evidence does not show that said railroad improvements or uses were on that portion of the land claimed and sued for by the plaintiffs.

(16.) The court erred in overruling plaintiffs' motion to set aside the finding of the jury rendered in response to said special instruction set forth in the 15th assignment of error.

(17.) The court erred in instructing the jury that if the road was properly constructed and operated it would be necessary to use sand, in order to do so properly and successfully; because said instruction was an improper comment on the evidence and not upon substantial issues in the cause, and because it was for the jury to say whether or not sand was necessary, and the testimony did not warrant a peremptory instruction in that respect, and the fact, if true, is wholly irrelevant and misleading.

(18.) The court erred in overruling plaintiffs' motion to set aside the finding of the jury rendered in response to said special instruction set forth in 17th assignment of error.

(19.) The court erred in refusing to give the jury the first special charge requested by plaintiffs, which is as follows:—"The jury are instructed to find for plaintiffs in this case."

(20.) The court erred in refusing to give to the jury the second special charge requested by plaintiffs, which is as follows:—"The jury are instructed to find for plaintiffs that portion sued for of the

25-acres tract deeded to the railroad company by Hughes and Slaughter."

(21.) The court erred in refusing to give to the jury the third special charge requested by plaintiffs, which is as follows:—"The jury are instructed to find for plaintiffs that portion of the 11.92-acres tract deeded to the railroad company by Mays and sued for by plaintiffs."

(22.) The court erred in refusing to give to the jury the fourth special charge requested by plaintiffs, which is as follows:—The jury are instructed that on the issues as to the use by the railroad company for railroad purposes of any of the property sued for, or the necessity or the intention to so use it, the burden of proof is on the defendants in this case to show such use, necessity or intention.

On the issues as to whether or not any of the property, if any, once used for railroad purposes, was afterwards permanently abandoned for such use or uses, the burden of proof is on the plaintiffs in this case to show such permanent abandonment. The
227 party upon whom rests the burden of proof in any issue must make out his case on such issue by a preponderance of the evidence. If he does so, you will find such issue in his favor; otherwise you will find against him."

(23.) The court erred in refusing to give to the jury the 5th special issue requested by plaintiffs, which is as follows:—

"Under the statutes of Texas, when the Cenyral Trust Company mortgage was executed on August 30, 1888, the Texas Trunk Railroad Company had forfeited the right, under its charter, to extend its road beyond its terminus at or near Cedar station in Kaufman county."

(24.) The court erred in refusing to give to the jury the 6th special charge requested by the plaintiff-, which is as follows:—"You are not authorized to find that any of the property involved in this suit, and not actually used for railroad purposes, or not fairly necessary to hold in connection with what is or was used for railroad purposes, was intended by the railway company for railroad purposes."

(25.) The court erred in refusing to give to the jury the 7th special charge requested by plaintiff-, which is as follows:—"You are instructed as follows:—Under the statutes of this State, a railroad company is authorized to own and permanently hold, in addition to its right of way, lands used for depot purposes, turnouts and switches, and including lands used for all necessary and convenient buildings and stations, fixtures and machinery for the accommodation and use of passengers, freight and business interests, or which may be necessary for the construction and operation of its railway. Unless lands are used for one or more of the above purposes, they are not used for railroad purposes, within the meaning of the issues submitted for your consideration.

You are further instructed that lands purchased by a railroad company for the purpose of subdividing the same into lots and selling the same to its employees are not purchased for railroad purposes within the meaning of the issues submitted for your determination."

(26.) The court erred in refusing to give to the jury the eighth special charge requested by plaintiffs, which is as follows:—"The jury are instructed that the burden of proof is on the defendants in this case to show by a preponderance of the evidence and with reasonable certainty what land, if any, sued for by plaintiffs, was used for railroad purposes. Such evidence must be sufficient to enable you to describe said land with reasonable certainty so that it may be definitely located on the ground. If the evidence is
228 not sufficient to enable you to so definitely locate the land with reasonable certainty, you will find against defendants on the question of the location of the lands, and the form of your verdict will be as follows:—"We, the jury, find that the evidence fails to locate with reasonable certainty the lands used by the railroad company for railroad purposes, and sued for by plaintiffs."

(27.) The court erred in refusing to give to the jury the ninth special charge requested by plaintiffs, which is as follows:—"You are instructed at the request of the plaintiffs, that the Texas Trunk Railroad Company 'No. 1' contracted to purchase the Hughes and Slaughter 25-acre tract and the Gaston tract, called 'the flat-iron tract,' about or practically the same time, and made railroad improvements on both tracts about the same time, and whether the 25-acre tract or the Gaston tract, or both, were purchased for terminal use, or other railroad use, is a question of fact for you, under the special issues submitted to you by the court."

(28.) The court erred in refusing to give to the jury the tenth special charge requested by plaintiffs, which is as follows:—"You are instructed, at the request of the plaintiffs, that the uncontroverted evidence shows that the Texas Trunk Railroad Company never acquired the title to the right of way used by it over what is known as the Gaston 'flat-iron tract' and the other tract of land of Gaston south of the Hughes and Slaughter 25-acre tract of land."

(29.) The court erred in refusing to permit plaintiffs to prove that no map or profile of the Texas Trunk railroad or of the land taken or obtained for the use thereof, as provided by R. S. (1879) art. 4248, was ever filed either in the office of the county clerk of Dallas county, or in the office of the county surveyor of Dallas county, or in the general land office, as shown by plaintiffs' first bill of exceptions.

(30.) The court erred in refusing to permit plaintiffs' witness W. L. Cabell to testify "that about the time the company purchased the Mays tract of land the company also contracted for the purchase of another tract near the same, upon which there was a fine spring of water, where the company intended to establish a summer garden and resort for the employees of the company who should reside on the Mays tract; and that both said tracts were negotiated for at the same time with the intention of using them together as indicated; but that for the want of funds the company was unable at the time to pay for the spring tract, and that it was never actually acquired by the company for that reason. All as shown by plaintiffs' second bill of exceptions.

229 (31.) The court erred in refusing to permit plaintiffs' witness W. L. Cabell and others to testify "that the Dallas, Cleburne & Rio Grande Railroad Company was chartered July 31, 1879, this company being succeeded September 6, 1880, by the Chicago, Texas & Mexican Central Railroad Company, which built the road from Dallas to Cleburne, crossing the 25-acres Hughes and Slaughter tract, and intersecting with the Texas Trunk a short distance south of said tract, as shown on map in evidence, said road now being owned by the Gulf, Colorado & Santa Fe Railroad Company; that the said D., C. & R. G. Co. and C., T. & M. C. Co. had common stockholders, directors and promoters with the Texas Trunk Company, and that said companies acted together for the purpose of locating and establishing a town at the intersection of the two roads, this point being then in the country, outside the corporate or settled limits of the city of Dallas, and that the Hughes and Slaughter tract was purchased as a part and parcel of this town-cite scheme." All as shown by plaintiffs' third bill of exceptions.

(32.) The court erred in admitting, over plaintiffs' objections, the testimony of the witness W. M. Johnson, as shown by the following bill of exceptions embraced in statement of facts:—

Counsel for defendants asked the witness the following question:

Q. "Assuming that the Texas Trunk railroad should be extended from Dallas, its present terminal, to its southern terminal, Sabine pass, with a branch over from some point on its main line to Sabine river, making about 350 miles of railroad in length, and having no other railroad property in Dallas, please state whether this 25-acre tract would be necessary for railroad terminals, yards, and other railroad purposes?"

The plaintiffs objected to the question and to the answer sought to be elicited from the witness, on the grounds that it was immaterial and irrelevant, and on the ground that the description in the International Trust Company mortgage and in the decree foreclosing the mortgage, could not be aided, enlarged, or explained by testimony as to what the railroad company needed, and on the further ground that what the railroad company needed could not be shown by the opinion of the witness. Each of the objections *were* overruled by the court and the witness answered as follows:

A. "Yes, the company would need that 25 acres or some other 25 acres contig-ous. They ought to *j*ave 40 acres."

To the overruling of the above objections, and the admission of said testimony, plaintiffs then and there excepted.

230 (33.) The court erred in admitting, over plaintiffs' objections, the testimony of the witness W. M. Johnson, as shown by the following bill of exceptions embraced in the statement of facts:—

"Counsel for the defendants propounded to the witness the following question:

Q. "Considering the locality and situation of the property (referring to the Hughes & Slaughter tract) is it favorably situated for handling freight in connection with other railroads?"

The plaintiffs objected to the question on the grounds of imma-

teriality and irrelevancy, and that the matter could not be shown by the opinion of the witness, and that the description in the International Trust Company's mortgage and the decree of foreclosure could not be aided, enlarged or explained by any such testimony, which objections were overruled by the court, and the witnesses answered as follows:—

A. "I consider that a very convenient point; it is reached by several streets, and it is within reach of the connecting lines of railroads, the Santa Fe, the Central, and the T. & P."

To the overruling of said objections and the admission of said testimony plaintiffs then and there excepted.

(34.) The court erred in admitting, over plaintiffs' objections, the testimony of the witness W. M. Johnson, as shown by the following bill of exceptions embraced in the statement of facts:—

Counsel for the defendants then propounded the following question:

Q. "Take the railroad as it existed in 1888, extending from Dallas to Cedar station about 50 miles, and if it was in condition to be operated, the average condition of Texas railroads, and was not renting terminals, stations, etc., from other lines, but has its own stations and terminals, and were to have its own stations in Dallas, and had its own shops for attending to its engines, and other properties for the operation of the railroad, state whether this 25-acre tract would be necessary for it, that is, without considering the 12 acres in the Gaston tract?"

The plaintiffs objected to the above question and to the testimony sought to be elicited thereby, on the ground that it was immaterial and irrelevant, and on the further ground, that the description in the Central Trust Company's mortgage or the decree foreclosing same, could not be aided, enlarged or explained by any such testimony, and on the further ground, that the facts could not be shown by the opinion of the witness,—each of the objections were overruled by the court, and the witness answered as follows:—

231 A. "Yes, sir, I think they would have needed it. It would have given them conveniences which they would not have had on a narrower or smaller piece of land. There would have been warehouses for different branches of business, and machine shops, and turnouts, and water stations, and depots, and other things, and I think the 25 acres would have been required for legitimate railroad purposes."

To which ruling of the court, and the admission of said testimony, plaintiffs then and there excepted.

The same question was then asked as to the conditions as they existed in 1895, and the same objections were made by plaintiffs and overruled by the court, and the witness made the same answer.

To which ruling of the court plaintiffs then and there excepted.

(35.) The court erred in not permitting plaintiffs to read in evidence the original check or draft in favor of C. C. Slaughter for $1250, and the accompanying voucher wrapper for the purpose of showing that Slaughter was not paid for his half interest in the land until September 25, 1880, and, in connection with other testimony

introduced, that the said Hughes and Slaughter deed was not delivered until on or after said date, all as shown by bill of exceptions contained in statement of facts.

(36.) The court erred in admitting in evidence the testimony of the defendants' witness W. H. Gaston, as shown by the following bill of exceptions contained in the statement of facts:—

The defendants' counsel here asked the witness the following question:

Q. "Do you know from circumstances coming to your knowledge at the time what the 25 acres was acquired for by the Texas Trunk Railroad Company?"

Plaintiff- objected to the question on the ground that the intention of the railroad company cannot be shown by the declarations of individual directors of the company, it not appearing that they were acting as a board or acting in any manner so as to bind the company.

The objection was overruled, and the witness answered:—

A. "I know what Henderson told me; he wanted it for terminal purposes."

To the admission of said testimony, and the overruling of above objections the plaintiff- then and there excepted.

(37.) The court erred in admitting in evidence over plaintiffs' objections, the testimony of defendants' witness William Whyte, as shown by the following bill of exceptions contained in statement of facts:—

"Here counsel for defendants asked the witness the following question:—

Q. Assuming that the Texas Trunk Railroad Company takes care of its own engines, has its own round-house and engines, and
232 its own yards and facilities, what do you say of the necessity of the 25-acre tract for the use of the company instead of using other companies' yards and facilities."

Plaintiffs objected to the question on the same grounds that they objected to W. M. Johnson's testimony on the same subject. The objections were overruled, plaintiffs excepted, and over said objections and exceptions the witness testified as follows:—

A. The ground would be absolutely necessary to have terminals; you coul- not get along without them; all of it would be necessary as it now stands. If the road were extended over the route called for by its charter from Dallas to Sabine pass with a branch from some point on its main line to the Sabine river this 25 acres would not be enough.

(38.) The court erred in admitting in evidence, over plaintiffs' objections, the testimony of defendants' witness William Whyte, as shown by the following bill of exceptions contained in statement of facts:—

Here counsel for defendants asked the following question:—

Q. If the Texas Trunk should be put in the average condition of other Texas roads, state whether or not all of the tract would be necessary for it?

Plaintiffs objected to the question on the same grounds that they objected to a similar question propounded to the witness Johnson. The objections were overruled, plaintiffs excepted, and over said objections and exception the witness testified as follows:—

A. All of the tract would be necessary and more.

(39.) The court erred in excluding the following testimony of the witness James B. Simpson:—The Gaston or flat-iron tract was to put shops on and a depot, and to make connection with the T. & P. railway I understood. I subsequently purchased a portion of this Gaston tract for a company I organized known as the Dallas Car & Agricultural Implement Mfg. Co. This company built extensive car shops on the land, and a very large building, for the purpose of the manufacture of railroad cars and agricultural implements. One of the inducements to put these shops there was the promise of the Texas Trunk Railroad Company to give me the work of that company to build its cars and the general repair work that the railroad had, and we expected to do this, and that was the chief inducement upon my part to put these works there, and it was the view of that contract that I was to do this work. I was president of the car company. We actually did have a good deal of work and repairs for the Texas Trunk Railroad Company, and did some what you
233 would consider blacksmith work, and cast some pieces for them. The plant covered about three acres. We filled it with extremely expensive machinery, the value of it I do not now recollect, but it was the very best we could get. J. M. Brosius was manager of that company. The concern failed afterwards. That is the same property now occupied by the Munger Machine Company.

At this point the court excluded all testimony as to the car shops, and instructed the jury not to consider the testimony for any purpose, to which ruling of the court plaintiffs then and there excepted.

(40.) In the instrument styled "opinion of the court," filed July 29, 1899, the court erred in the statement that the Texas Trunk Railroad Company was chartered in October, 1879, the record showing that the company was chartered on November 6, 1879.

41. In said opinion the court erred in the statement that the Federal court "resumed control of the property, as provided for in the decree" there being no such provision in the decree, and no such "resumption" of control.

(42.) In said opinion the court erred in the statement that the Federal court receiver in the Central Trust Company foreclosure suit "has never been discharged, and is still operating the road," the record showing that the resignation of Dillingham, the first receiver in said suit, was accepted November 30, 1892; that on December 3, 1892, Atkins was appointed and on December 5, 1892, qualified as the successor of Dillingham; that on February 26, 1895, a final decree of foreclosure and sale was passed, under which all the mortgaged property in the custody of the court was sold to defendant Pardee on August 6, 1895, and said sale confirmed in vacation September 27, 1895, and in term time, March 3, 1896; that on March 16, 1896, an order was made directing that "upon such purchaser so paying satisfying and making good the said balance of

his bid, the railroad property so sold shall be, *upon demand of said purchaser or his assigns*, delivered to said *delivered to said* purchaser by the receiver herein;" that said order was complied with by the purchaser, and thereafter, on April 9, 1896, said purchaser received a deed to the property; that since —— 9, 1896, by the terms of said order, said railroad and other property sold has been subject to the demand of the said Pardee and not subject to the order, control or custody of the court; that on August 5, 1896, on said Pardee's petition, an order was made purporting to remove Atkins as receiver, and purporting to appoint Whyte as receiver, merely to enable Pardee, the purchaser, to continue to hold and operate the road him-
234 self, under the ostensible protection of the Federal court, said court in fact having no possession, control or custody of the property, or right to the same, but said ostensible Federal court receiver being in fact and in law the mere private agent of said Pardee, and by the terms of the order of the court subject to the orders of Pardee; and that this fraud on the law and all public and private rights still continues, at least in so far as it has been submitted to.

(43.) In said opinion the court erred in the statement that Gaston, receiver, "has never obtained actual possession of any of the property" said statement being uns-pported by the record, which shows that Gaston obtained possession of all the property of the third company such as was in fact embraced in the Cenyral Trust Company mortgage.

(44.) In said opinion the court erred in the statement that the Hug-es and Slaughter tract of land was bought by the railroad company "for railroad purposes," such statement being in direct conflict with the verdict of the jury, which finds expressly that *all* of said tract, except 100 feet off of the west side thereof, was acquired by the company "for the purpose of subdividing the same into lots and selling the same to employees of the company," said verdict being abundantly supported by the evidence and not being excepted to in any way.

(45.) In said opinion the court erred in the following statement concerning the Hughes and Slaughter tract: "At the time it was purchased it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad company, and part of the sheds of said railroad company, and whatever switches and side tracks should be necessary in the operation of the railroad, and if these did not occupy all of the land then to sell lots on the eastern side of the land to its employees so that they might be near their work. No such sales have ever been made, nor has any part of the land been subdivided into lots." Said statement is uns-pported by the evidence and in direct conflict with the verdict, in so far as it alleges that it was the purpose of the railroad company to use for any railroad purpose any of said land, except 100 feet off the west side thereof, and that there was any contingency about the purpose of the company to sell the land for lots, and that the sale- for lots were to be confined to the "eastern side of the land," and that it was the intention of the company to use

for railroad purposes any of the land claimed and used *for* by plaintiffs.

(46.) In said opinion the court erred in the following state-
235 ment:—"The railroad company built its main track lengthwise across the land near the western boundary, and also built a side track on it and a Y near the center of it and extending eastwardly beyond the center of the land, and also a small house, used as a ticket office and a car shed. It used in the operation of its road up to 1892 the main and side track- and houses." Said statement is unsupported by the evidence and in direct conflict with the verdict of the jury, in so far as it alleges any railroad use of any of the land, except 100 feet off the west side thereof, and affecting any issues in this case, the undisputed evidence and verdict of the jury showing that all said railroad uses and improvements, except said Y, were within 100 feet, that said Y was a mere temporary affair, and that it was not used by the railroad company, or on the land, at the dates of either of the mortgages in question, or of the decrees foreclosing the same.

(47.) In said opinion the court erred in the statement that "this was the only land that it owned in Dallas, where it terminated," the record showing that this land was not then in Dallas, that the company did not own it when the International Trust Company mortgage was executed, and that the company contracted for and went into possession of other land for terminals.

(48.) In said opinion the court erred in the statement that "both as originally contemplated and as actually constructed, if the road had been properly constructed and operated, it would have needed as much as 25 acres for terminal facilities, such as switches, sheds etc. and such would have been the usual and proper amount for such purposes of such construction and operation." Said statement is erroneous, because immaterial, irrelevant, misleading and unsupported by the evidence, and the jury -as expressly found that "considering the reasonable intentions and actual or probable present and future needs of the railroad company," no part of said land, except 100 feet off the west side thereof, was reasonably necessary for the "construction, equipment or operation" of the railroad, either at the date of the International Trust Company mortgage, March 22, 1880, or the date of its foreclosure, January 31, 1883, and the jury has also expressly found that considering the reasonable intentions and actual or probable present and future needs of the railroad company when the Central Trust Company mortgage was executed on August 30, 1888, none of said land, except 100 feet, was then reasonably necessary for the construction, repairs, renewal, improvements, completions, operation or management of the railroad," said findings of the jury being direct negative findings in the very
236 language of said mortgagees and being upon the substantial issues in the case, and not being in any way excepted to, and being fully supported by the evidence.

(49.) In said opinion the court erred in the statement that the Mays tract was bought by the railroad company "for railroad purposes," said statement being wholly unsupported by the evidence

and being in direct conflict with the verdict of the jury, which finds expressly that said tract was not bought by the railroad company "for use either immediate or prospective, in the construction, repair or improvement of its railroad;" that neither in 1880 nor in 1888 was said tract reasonably necessary "for the present or prospective use of the Texas Trunk Railroad Company, in the construction, repair or improvement of its railroad then built or authorized by its charter to be built and operated," that said tract "was originally acquired by the railroad company for the purpose of subdividing the same into lots and selling the same to employees of the company" said special findings of the jury being abundantly supported by the evidence, and not being excepted to in any way.

(50.) In said opinion the court erred in the statement in reference to the Mays tract as follows: "It had on it sand. At the time it was purchased it was the purpose and intention of the railroad company and its officers to use the sand in the construction and ballasting of the road-bed also to place on it such switches and side tracks as might be necessary in the operation of the road. The main track of the railroad was built across it lengthwise, near the eastern boundary, and also a spur track running out from the main track, but near to it, across the land so as to reach the sand, and sand has since been taken from the land and used in the construction and repairing and bal-asting said road. The road has thus occupied about two acres of the tract." Said statement is wholly unsupported by the evidence, except as to the 200-foot right of way which is not sued for, and it is wholly irrelevant and misleading, and in direct conflict with the verdict of the jury, and the evidence as to all the land involved in this suit.

(51.) In said opinion the court erred in the following statement:— "If the road was properly constructed and operated, it would be necessary to use sand in order to do so properly and successfully, and all of this tract would be necessary and required for these purposes." Said statement is unsupported by the evidence and is in direct conflict with the verdict of the jury as shown in 48th assignment of error.

(52.) In said opinion the court erred in the statement that
237 the first company is the common source of title, the record showing that this is true only as to part of the land in controversy.

(53.) In said opinion the court erred in the following statement:— "The plaintiffs contend that, under these facts, this mortgage only covered the right of way of the Texas Trunk Railroad Company over all the lands and no more." The contention of the plaintiff in the court below is shown by the requested charges, by their bills of exceptions, and by their motion to reform the judgment. This contention, briefly stated, is that the mortgages and foreclosure decrees embraced what was properly described in them, and no more, and that these descriptions cannot be enlarged by speculations as to what the company might possibly have needed if it had been a very different sort of a company.

(54.) Said opinion of the court is erroneous from beginning to end, both as to the facts and the law, in every essential particular.

Wherefore, plaintiffs below, appellants here, pray

(1.) That as to said Hughes and Slaughter tract except 100 feet on the west side thereof, and said Mays tract, except 100 feet off each side of the center of the main track of the railroad, the judgment be reversed, reformed and rendered in favor of plaintiffs, and if this cannot be done that said judgment be reversed and remanded.

(2.) That as to all the lands except said Hughes and Slaughter and Mays tracts, the judgment be affirmed.

(3.) That plaintiffs may have such other relief as they may be entitled to.

ALEXANDER, CLARK & THOMPSON,
DICKSON & MORONEY,
Attorneys for Plaintiffs and Appellants.

Filed Aug. 19, 1899.
H. W. JONES,
Clerk District Court, Dallas Co.,
By H. H. WILLIAMS, *Dep-ty.*

Defendants' Assignments of Error.

Filed Aug. 22nd, 1899.

In District Court of Dallas County, Texas, Forty-fourth Judicial District.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDE- ET AL. } No. 17147.

238 Assignments of error.

Now come defendants in said cause, Edward H. Pardee and Collis P. Huntington, and say that in the record, proceedings and judgment in said cause divers errors were committed by the court to the prejudice of said defendants, who thereupon come and file the following assignments of error:

First Assignment of Error.

The court erred in overruling and refusing the application of the defendants to remove said cause to the United States circuit court.

Second Assignment of Error.

The court erred in overruling defendants' special demurrer to plaintiffs' first amended original petition which special demurrer is as follows:

"And for further answer in this behalf the defendants in said cause demur to plaintiffs' first amended original petition herein and say

that the same is insufficient in law because it appears therefrom that plaintiffs are not actually interested in the subject-matter of this suit, but are assuming to represent and sue in behalf of others whose names and interest are not disclosed. And of this defendants pray judgment of the court."

Third Assignment of Error.

The court erred in refusing special charge No. 1 requested by defendants, as follows:

"The plaintiffs having failed to show title to the property sued for you are instructed to return a verdict in favor of defendants."

Fourth Assignment of Error.

The court erred in refusing special charge No. 2 requested by defendants, as follows:

"It appearing that the judgment in the case entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, No. 4333, rendered by the district court of Dallas county, Texas, which has been admitted in evidence before you, was rendered after the defendant corporation was dissolved, you are instructed to exclude said judgment from consideration in arriving at your verdict in this case."

Fifth Assignment of Error.

The court erred in refusing special charge No. 3 requested by defendants, as follows:

"You are instructed to exclude from consideration in arriving at your verdict in this case, the evidence of the execution issued upon a judgment of W. F. Thompson *vs.* Texas Trunk Railroad Company, in the district court of Dallas county, Texas, and the *of* levy
239 of said execution, and the sale and deed made in pursuance thereof, which has been admitted in evidence before you on behalf of the plaintiffs herein."

Sixth Assignment of Error.

The court erred in refusing special charge No. 4, requested by defendants, as follows:

"You are instructed that the judgment of the district court of Dallas county in and for the 44th judicial district, in favor of C. C. Bumpas, as trustee for J. E. Downes and associates, rendered April 7, 1898, in cause No. 14047, entitled C. C. Bumpas *vs.* John F. Ely, *et al.*, in so far as the same is against John F. Ely, James B. Simpson, W. L. Cabell, and D. A. Robinson, as surviving directors and trustees of the Texas Trunk Railroad Company, as originally incorporated, etc., is void, and you will exclude same from consideration in arriving at your verdict in this case."

Seventh Assignment of Error.

The court erred in refusing special charge No. 5 requested by defendants, as follows:

"You are instructed that the judgment of the district court, of Dallas county, Texas, in and for the 44th judicial district, rendered April 7, 1898, in cause No. 14047 upon the docket of said court, entitled C. C. Bumpas *vs.* John F. Ely *et al.*, in so far as the same is against the Texas Trunk Railroad Company, is void, and you will exclude the same from consideration in arriving at your verdict in this case."

Eighth Assignment of Error.

The court erred in refusing special charge No. 6 requested by defendants, as follows:

"You are instructed that the judgment of the district court of Dallas county, Texas, in and for the 44th judicial district, rendered April 7, 1898, in cause No. 14047, entitled C. C. Bumpas *vs.* John F. Ely *et al.*, in so far as the same is against John H. Gaston as receiver, etc., which has been admitted in evidence before you, is inadmissible as evidence of title in plaintiffs, and you will exclude the same from consideration in arriving at your verdict in this case."

Ninth Assignment of Error.

The court erred in refusing special charge No. 7 requested by defendants, as follows:

"You are instructed that the deeds executed by James B. Simpson, John F. Ely, D. A. Robinson and W. L. Cabell, as directors and trustees of the Texas Trunk Railroad Company, to C. C.
240 Bumpas, trustee, etc., which have been admitted in evidence before you are void, and you will exclude the same from consideration in arriving at your verdict in this case."

Tenth Assignment of Error.

The court erred in refusing special charge No. 8 requested by defendants, as follows:

"You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered on the 31st day of January, 1883, foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company, as trustee, and ordering sale of the property embraced in said mortgage, and the subsequent decree of said court in said cause, rendered on June 6, 1883, which decrees have been introduced in evidence before you, and the sales made under and in pursuance of said decrees, embraced the property sued for in this cause, and were effectual to vest title to the same in those under whom defendants claim, and you are therefore inatructed to return a verdict in favor of the defendants."

Eleventh Assignment of Error.

The court erred in refusing special charge No. 9 requested by defendants, as follows:

"You are instructed that the decree of foreclosure and sale rendered by the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 193 upon its equity docket, foreclosing the mortgage previously executed by the Texas Trunk Railroad Company to the Central Trust Company of New York, as trustee, and ordering the sale of the property covered by said mortgage, and the sale made under and in pursuance of said decree to defendant, Edward H. Pardee, embraced the property involved in this suit, and was effectual to vest the title to said property in the said Edward H. Pardee, and you are therefore instructed to return a verdict in favor of the defendants."

Twelfth Assignment of Error.

The court erred in refusing the thirteenth special charge as requested by defendants, as follows:

"It appearing from the uncontradicted evidence that the deeds executed by W. L. Cabell, John F. Ely, J. B. Simpson, and D. A. Robinson as trustees of the sold-out Texas Trunk Railroad Company to C. C. Bumpas, trustee etc., which have been introduced in evidence, were without consideration and in abdication and violation of the trust vested in the said Cabell, Ely, Simpson and
241 Robinson, by law, and in abuse of said trust, you are instructed to disregard said deeds in your verdict."

Thirteenth Assignment of Error.

The court erred in refusing the fourteenth special charge as requested by defendants, as follows:

"It appearing from the uncontradicted evidence that the judgment in cause No. 14047 entitled C. C. Bumpas, trustee, etc., *vs.* John F. Ely *et al.*, rendered by the 44th judicial district court of Dallas county, Texas, on April 7, 1898, was as between said C. C. Bumpas, plaintiff therein, W. L. Cabell, Jno. F. Ely, J. B. Simpson, D. A. Robinson, as trustees of the sold-out Texas Trunk Railroad Company, *was* with the acquiescence and consent of said trustees in pursuance of the previous abdication and violation of their trust by the deeds, executed by them to C. C. Bumpas, trustee, (which deeds you are also instructed to disregard) you are instructed to disregard said judgment in arriving at your verdict."

Fourteenth Assignment of Error.

The court erred in admitting in evidence, over the objections of defendants, that part of the agreement as to certain facts, between the parties to this cause, which shows that on March 15, 1887, in the suit of W. F. Thompson against The Texas Trunk Railroad Com-

pany, No. 4333, upon the docket of the district court of Dallas county, Texas, judgment was rendered in favor of Charles Vidor and Jno. Wolston, as assigns of plaintiff, W. F. Thompson, and as surviving partners of Wolston, Wells & Vidor, against the Texas Trunk Railroad Company for the sum of $4250.00, besides costs, and besides foreclosing attachment lien, as fully shown by defendants' bill of exception- No. 1.

Fifteenth Assignment of Error.

The court erred in admitting in evidence over defendants' objections that part of said agreement of the parties which shows that on March 9, 1895, an alias general execution was issued to Dallas county, on or by virtue of the judgment of the district court of Dallas county, entered as of March 15, 1887, in case No. 4333 upon its docket, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, and showing that said execution was lev-ed on the same day, on so much of the lands described in plaintiffs' first amended original petition as are located in Dallas county; and that on April 2, 1895, said lands were sold under said execution and levy by the sheriff to C. C. Bumpas, trustee for J. E. Downes and associates, and that the sheriff in pursuance of said execution and sale exe-
242 cuted deed for said lands to said C. C. Bumpas as such trustee, as fully shown in defendants' bill of exceptions No. 2.

Sixteenth Assignment of Error.

The court erred in admitting in evidence, over defendants' objection, that part of said agreement between the parties to this cause which showed that on August 3, 1895, a *pluries* general execution was issued to Houston county on or by virtue of the judgment of the district court of Dallas county, Texas, enetered as of March 15, 1887, in case No. 4333 upon its docket, entitled W. F. Thompson *vs.* Texas Trunk Railroad Company, and showing that such execution was levied on September 6, 1895, on so much of the lands described in plaintiffs' first amended original petition as are located in Houston county, and that on October 1, 1895, said lands were sold under said execution and levy by the sheriff to C. C. Bumpas, trustee for J. E. Downes and associates, and that the sheriff in pursuance of such execution, and sale executed deed for said land to said Bumpas, as such trustee as fully set forth in defendants' bill of exception No. 3.

Seventeenth Assignment of Error.

The court erred in admitting in evidence, over defendants' objections, that part of the agreement between the parties to this cause, which showed that on April 7, 1898, in case No. 14,047, upon the docket of the 44th judicial district court in and for Dallas county, Texas, entitled C. C. Bumpas *vs.* Jno. F. Ely *et al.*, judgment was rendered decreeing that the Texas Trunk Railroad Company as originally incorporated, be dissolved as a corporation; that Jno. F.

Ely, James B. Simpson, W. L. Cabell and D. A. Robinson were all the surviving members of the last board of directors of said company and trustee of said dissolved incorporation; that C. C. Bumpas as trustee for J. E. Downes and associates, have and recover of said Ely, Simpson, Cabell and Robinson, as surviving directors and trustees of the Texas Trunk Railroad Company, as originally incorporated, and of John H. Gaston, as receiver of Texas Trunk Railroad Company, as subsequently reorganized, title and possession of all lands and premises involved in the present suit, as fully shown in defendants' bill of exceptions No. 4.

Eighteenth Assignment of Error.

The court erred in admitting in evidence, over defendants' objections, that part of said agreement, between the parties to this cause which showed that on December 28, 1897, James B. Simpson, D. A. Robinson, John F. Ely and W. L. Cabell as directors and trustees of the Texas Trunk Railroad Company as incorporated on the 6th day of November, 1879, executed to C. C. Bumpas, trustee for
243 J. E. Downes and associates, for a recited consideration "of the sum of one dollar and other valuable considerations" a deed without warranty, conveying to said Bumpas as trustee the lands located in Dallas county described in plaintiffs' first amended original petition in this cause, and "also all other lands in Dallas county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company," and showing also that on the same day deeds were executed in the same form by same grantors to the same grantee conveying the Kaufman and Houston county lands described in plaintiffs' first amended original petition in this cause, and also conveying generally all other lands in Houston and Kaufman county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company, as fully set forth in defendants' bill of exception No. 5.

Nineteenth Assignment of Error.

The court erred in charging the jury as follows:

"As to all of the land sued for except the 25 acres bought from Hughes & Slaughter, and described as tract No. *b* in plaintiffs' petition, and the 11 92/100-acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition, you will find for the plaintiff-, leaving out the right of way over all said land, and as to these tracts the firm of your verdict will be as follows: 'We, the jury, find for the plaintiffs all the land sued for save and except the right of way of the Texas Trunk railroad through the towns of Kaufman and Crandall, as shown on the maps of said towns recorded in vol. 50, page 163 and vol. 33, page 605, of the deed records of Kaufman county, Texas, and save and except the right of way 100 feet in width on each side of the center of the main tract of the Texas Trunk railroad where it may cross any of said land, and also save and except the 25-acre tract bought from Hughes & Slaughter and described as tract No. *b* in plaintiffs' petition and the 11 92/100-

acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition.' "

Twentieth Assignment of Error.

The court erred in refusing the tenth special charge as requested by defendants, which special charge is as follows:

" You are instructed that the decree of the circuit court of the United States, in and for the northern district of Texas, at Dallas, rendered on the 31st day of January, 1883, foreclosing the mortgage previously executed by the Texas Trunk Railroad Company to the International Trust Company, and ordering the sale of the property covered by said mortgage, and the subsequent decree of said
244 court in said cause, rendered June 6, 1883, and the sale made under and in pursuance of said decree, embraced and was effectual to, and did, vest in those under whom defendants claim, the title to the second and fourth tracts of land described in plaintifds' first amended original petition in this cause—that is to say, the twenty-five (25) acre tract described by metes and bounds in subdivision (*b*), and the 11.92-acre tract described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this cause, and you are therefore insyructed to return a verdict in favor of defendants for said two tracts of land."

Twenty-first Assignment of Error.

The court erred in refusing the eleventh special charge as requested by defendants, which special charge is as follows:

" You are instructed that the decree of foreclosure and sale rendered by the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 193 upon its equity docket, February 26th, 1895, foreclosing a mortgage previously executed by the Texas Trunk Railroad Company to the Central Trust Company of New York as trustee, and ordering the sale of said property, and the sale made under and in pursuance of said decree, embraced and was effectual to, and did, vest in defendant, Edward H. Pardee, the title to the second and fourth tracts of land described in plaintiffs' first amended original petition in this cause that is to say, the 25-acre tract described by metes and bounds in subdivision (*b*), and the 11.92-acre tract described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' firsy amended original petition in this cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land."

Twenty-second Assignment of Error.

The court erred in refusing the twelfth special charge as requested by defendants, which special charge is as follows:

" You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 275 upon its equity docket, in favor of Geo. T. Atkins, as

receiver, etc., and against C. T. Campbell *et al.*, rendered on July 16, 1895, which, with the original bill of complaint in said cause, has been introduced in evidence before you, was effectual to establish and bring into the custody of said court, through Geo. T. Atkins as receiver, in equity cause No. 193 upon the docket of said
245 court, the two tracts of land described in plaintiffs' first amended original petition in this case; that is to say, the 25-acre tract described by metes and bounds in subdivision (*b*), and the 11.92-acre tract described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land."

Twenty-third Assignment of Error.

The court erred in refusing the fifteenth special charge as requested by defendants, as follows:

"You are instructed that the right of the Texas Trunk Railroad Co. to purchase, own and mortgage land was not confined to such as was needed at the time of purchase, under the circumstances then existing, but that it had the right, under the law, to purchase, own and mortgage, such land as would have been reasonably necessary for stations, switches, yards, shops and other proper terminal facilities, had it completed and put in operation the entire lines of railroad it was at the time authorized by its charter to construct and operate."

Twenty-fourth Assignment of Error.

The court erred in refusing the sixteenth special charge as requested by defendants, which special charge is as follows:

"You are instructed that the Texas Trunk Railroad Co. had the right under the law, to purchase, own, and mortgage such land as was, at the time, or as would have been upon the completion of the entire lines authorized by its charter to be built, reasonably necessary for use as land or material in constructing or improving its railroad, then existing or as authorized by its charter to be constructed."

Twenty-fifth Assignment of Error.

The court erred in permitting plaintiffs' witness W. M. Johnson to testify, over defendants' objections, substantially to the effect that the twenty-five acres of land located in East Dallas and conveyed by W. E. Hughes and wife and C. C. Slaughter and wife to the Texas Trunk Railroad Company, by deed dated March 13, 1880, was abandoned and not used as terminals for the Texas Trunk Railroad soon after the appointment of Charles Dillingham as receiver of said railroad etc., in September, 1891, and was also permitted to testify as to the railroad structures and improvements which had been removed from said tract of land when he surveyed and examined the same in 1895, all as more fully set forth in defendants' bill of exception No. 7.

246 *Twenty-sixth Assignment of Error.*

The court erred in permitting plaintiffs' counsel to read in evidence, over defendants' objections, the part of the lists of property of the Texas Trunk Railroad Company rendered to the Texas assessor of Dallas county, Texas, from 1889 to 1898, inclusive, which contained a copy of the statute, appearing now as article 5082 of the Revised Statutes of 1895, and including certain printed directions therein, all as more fully set forth in defendants' bill of exception No. 8.

Twenty-seventh Assignment of Error.

The court erred in admitting in evidence, over defendants' objections, that part of the agreement of the parties to this suit shown in statement of facts, to the effect that Judge Pardee was beyond the territories limites of the Federal district of Texas, and of the 5th circuuit court when he made the order appointing Charles Dillingham receiver, all as more fully set forth in defendants' bill of exception No. 9.

Twenty-eighth Assignment of Error.

The court erred in not holding and in not rendering judgment in favor of defendants, upon the ground, that the sale of the second and fourth tracts of land described in plaintiffs' first amended original petition, that is to say the 25-acre tract described by metes and bounds in subdivision (*h*) and the 11.92-acre tract described by metes and bounds in subdivision (*d*) of plaintiffs' said petition, made by the sheriff of Dallas county *eo* E. M. Powell and associa-es, under and by virtue of executions and orders of sales issued on judgments rendered by the district court and county court of Dallas county against the Texas Trunk Railroad Company, as originall- existing, was sufficient to and did vest in said E. M. Powell and associates, under whom defendants claim the title to the two tracts of land above referred to,

Twenty-ninth Assignment of Error.

The court erred in overruling and denying the defendants' motion for new trial.

Wherefore defendants pray that said judgment, in so far as the same decrees or awards any of the said lands and premises to
247 the plaintiffs, or is against the defendants, be reversed.

BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Edward H. Pardee and Collis P. Huntington, Defendants.

Filed Aug. 22, 1899.
H. W. JONES,
Clerk District Court, Dallas Co.,
By ELMO TRIMBLE, *Dep-ty.*

Bill of Costs.

Filing petition & docketing	$ .30
Iss. 3 notices & 2 copies petition	8.25
Filing petition for removal	.10
Filing bond for removal	.10
Filing 1st amended petition for removal with certificate and seal to same	.60
Filing answer and entering 2 appearances	.20
Entering order on motion for removal	.50
Am't paid by pl'ff- for serving notice	3.80
Making transcript for removal for def't-	7.00
Taxing costs	.25
Entering 1 continuance	.20
Entering order transferring to 14th court	.25
Jury fee paid by pl'ff-	5.00
Filing cert. copy of order of U. S. court remanding to State court	.10
Continuance by defendant-	.20
Continuance by defendants	.20
Forward	$27.05

248	Forward	$27.05
	Entering order transferring to 44th court	.25
	Filing application for subp., def't-	.10
	Iss. 1 subp., 3 extra names	.70
	Filing 3 papers for plaintiff-	.30
	Filing 1st amended original petition	.10
	Filing 1st amended original answer	.10
	Swearing and empaneling jury	.35
	Swearing 3 witnes-es for pl'ff-	.30
	Filing discontinuances as to certain things, P.	.10
	Filing charge & 10 special charges, P.	1.10
	Filing 16 special charges for def'ts	1.60
	Filing verdict of jury	.10
	Filing & docketing motion for judgment, pl'ff-	.25
	Entering order appointing special judge	1.25
	Filing def'ts' motion to enter judgment	.10
	Filing 9 bills of exceptions for def'ts	.90
	Filing pl'ffs' bill of exception	.10
	Filing & docketing motion for new trial, def'ts	.25
	Filing and docketing motion to reform judgment, P.	.25
	Filing pl'ffs' bill of exceptions	.10
	Filing statement of facts for pl'ff-	.10
	Filing and approving appeal bond, pl'ff-	1.60
	Entering order on motion to reform judgment, pl'ff-	.25
	Entering order overruling motion for new trial, def'ts	.25
	Receiving and recording verdict of jury	.35
	Entering judgment, pl'ff-	16.00

Filing opinion of court	.10
Filing assignment of errors, pl'ff-	.10
Filing assignment of errors for def't	.10
Sheriff Cabell serving subp. for pl'ff-	2.00
Making transcript	97.65
	$155.45

249 *Clerk's Certificate.*

THE STATE OF TEXAS, }
County of Dallas. }

I, H. W. Jones, clerk, district courts, Dallas county, Texas, hereby certify that the foregoing 279 pages contain a true and correct transcript of all the proceedings had on the trial of said numbered and entitled cause as the same now appear of record and on file in my office.

Given under my hand and seal of office, at Dallas, this, the 2 day of Sept., A. D. 1899.

H. W. JONES,
[L. S.] *Clerk Dist. Courts, Dallas Co., Tex.*

(Endorsements on transcript:)

No. *2865*. *Assignment.* A. D. Aldridge *et al.*, appellants, *vs. E. H. Pardee et al., appellees. From the district court of the 44 district for Dallas county.* Applied for by Dickson & Moroney, att'ys for pl'ffs and Baker, Botts, Baker & Lovett, att'ys for def'ts on the 27 day of July, A. D. 1899, and delivered to Dickson & Moroney, att'ys for pl'ffs and Baker, Botts, Baker & Lovett, att'ys for def'ts, on the 2 day of Sept. A. D. 1899. H. W. Jones, clerk district court Dallas county. Filed in court of civil appeals at Dallas the 2nd day of September, 1899. Geo. W. Blair, clerk.

250 Proceedings had in court civil appeals, 5th district, Dallas, Dallas county, Texas.

Order Setting Case for Submission November 25th, 1889.

It is ordered by the court that the following cases be set down for submission on the 9th day of December, 1899; * * * No. 2865—A. D. Aldridge *et al. vs.* E. H. Pardee *et al.* * * * and that the clerk notify the parties in the manner prescribed by law.

Agreement to Postpone Submission.

A. D. ALDRIDGE ET AL. }
vs. } No. 2865.
E. H. PARDEE ET AL. }

SATURDAY, *December 9th*, 1899.

Passed by agreement.

Submission of Cause.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 2865.

SATURDAY, *February 17th*, 1900.

Submitted on briefs and oral argument for both parties.

Opinion. Filed June 30th, 1900.

A. D. ALDRIDGE ET AL. vs. E. H. PARDEE ET AL. } No. 2865. Appeal from Dallas County.

Opinion.

This is an action of trespass to try title, brought by plaintiffs below, A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes, and associates, against defendants below, E. H. Pardee and Collis P. Huntington, to recover certain lands in Dallas, Kaufman and Houston counties. It was agreed that the Texas Trunk Railroad Company, incorporated under the general law of Texas, November 6, 1879, was the common source of title. Under peremptory instructions of the court the jury found for the plaintiff-

for all the land sued for except two tracts, known as the
251 "Hughes and Slaughter tract" and the "Mays tract." As to these two tracts various special issues were submitted by the court, and upon the return of the verdict of the jury judgment was rendered in favor of defendants. From this judgment both plaintiffs and defendants prosecute an appeal.

The evidence shows that the Texas & Trunk Railroad Company was duly incorporated November 6, 1879, under title 84, Rev. St. 1879. Under this charter there have been three distinct and separate organizations. The original company was sold out under foreclosure sale, and the purchasers reorganized under the original charter. This company was likewise sold out, and the purchasers also reorganized under the original charter. In discussing the questions raised, these organizations will be designated respectively, Company No. 1, 2, and 3.

There were two main issues raised by the briefs of the parties. One is the contention of the defendants that the muniments of title relied upon by plaintiffs fail to make a *prima facie* case. The other is the contention of plaintiffs that the mortgages under the foreclosures of which the defendants claim title did not embrace the lands in controversy, and under which foreclosure the title to the land did not pass. As to plaintiffs' title the record shows that on November 4, 1881, W. F. Thompson brought suit against the Texas Trunk Railroad Company No. 1, and on March 15, 1887, in said suit, judgment was rendered in favor of plaintiff. On March 9,

1895, execution was issued and levied on all the Dallas county land involved in this suit. On August 30, 1895, execution was issued on said judgment to Houston county, and was levied on all the Houston county land involved in this suit. Sales of said land were made by virtue of said execution, and the same was bid in by C. C. Bumpass as trustee for J. E. Downes and associates, and deeds were made to him by the sheriffs of Dallas and Houston counties respectively. C. C. Bumpass, trustee for J. E. Downes and associates, brought an action of trespass to try title to recover all the land in litigation against John F. Ely, James B. Simpson, D. A. Robinson, and W. L. Cabell, the surviving directors and trustees of the Texas Trunk Railroad Company as originally incorporated, being Company No. 1, and John H. Gaston as receiver of the
252 Texas Trunk Railroad, No. 3, appointed by the district court of Ellis county at the instance of the State; and on April 7, 1898, judgment was rendered in favor of said Bumpass, trustee as aforesaid. On January 16, 1896, C. C. Bumpass, trustee for J. E. Downs and associates, conveyed the land in controversy to A. D. Aldridge, A. F. Hardie and W. G. Mowry, as trustees for J. E. Downes and associates. On December 28, 1897, and after the commencement of the suit of Bumpass, trustee, against Ely, above mentioned, James B. Simpson, D. A. Robinson, John F. Ely and W. L. Cabell, as surviving directors and trustees of the Texas Trunk Railroad Company No. 1, deeded to C. C. Bumpass, trustee as aforesaid, the Dallas county lands, and on February 4, 1898, said Bumpas deeded to plaintiffs herein, as trustees, the lands involved in this suit. In this connection it is to be noted that the Texas Trunk Railroad Company, as originally organized, had been sold out, and the purchasers had reorganized under the original charter at the time of the institution of the Bumpass-Ely suit and the execution of the conveyances by Simpson and others to Bumpass, trustee, and that said Simpson, Robinson, Ely, and Cabell were the only surviving directors of the original Texas Trunk Railroad Company.

The defendants complain of the court for overruling defendants' special demurrer to plaintiffs' first amended original petition, the ground of demurrer being that it appears from plaintiffs' petition that plaintiffs are not actually interested in the subject-matter of this suit, and are assuming to represent and sue in behalf of others, whose names and interests are not disclosed. The proposition of defendants is that "a mere naked trustee, without interest or legal duty with respect to the subject-matter of litigation, and appointed only for the purpose of acting as plaintiff, and without power to direct the litigation, is not authorized to prosecute it." The petition alleges as follows: "Plaintiffs, as sole trustees of the legal title to the lands and premises hereinafter described, bring this suit for the use and benefit of J. E. Downes and associates, who were creditors of the Texas Trunk Railroad Company, as formerly variously organized, and their privies and assigns who are beneficially interested in said legal title, and being all such creditors who have authorized and contributed to the expense of this suit;
253 and also for the use and benefit of such other general creditors, if any, having enforceable demands against said com-

as are entitled to participate in the benefits of what may be recovered herein, and who shall, in like manner, contribute to the expense of this suit, and ratify and adopt said trusts. This suit is brought and prosecuted under the direction of Dickson & Moroney, who, as attorneys for J. E. Downes and -ssociates, are authorized to direct such trustees in the recovery, by suit or otherwise, of any of said property that may be held adversely, or to which any person or persons may assert any adverse claim." The foregoing allegations show that plaintiffs, as trustees, held the legal title to the land, which gives them the right to prosecute suit. It is well settled that one who has a legal title as mere naked trustee may sue in his own name, though the entire equitable title be in another. Thompson *v.* Cartwright, 1 Tex. 87; McMillan *v.* Croft, 2 Tex. 397; Knight *v.* Holloman, 6 Tex. 153; Wimbish *v.* Holt, 26 Tex. 673; Zachary *v.* Gregory, 32 Tex. 452; Price *v.* Wiley, 9 Tex. 142; Martal *v.* Somers, 26 Tex. 551; Smith *v.* Wingate, 61 Tex. 54; Cooke *v.* Avery, 147 U. S. 375; 13 Sup. Ct. 340, 37 L. Ed. 209. The allegation that certain attorneys were authorized to direct the trustees in the litigation is immaterial, and does not affect the right of the trustees to recover. The court did not err in overruling the demurrer.

The objection is made by the defendants to the action of the court in permitting plaintiffs to introduce in evidence the judgment rendered in favor of W. T. Thompson against the Texas Trunk Railroad Company, and executions issued by virtue thereof, and sales thereunder, and the conveyances of the sheriffs by virtue thereof; the contention being that said proceedings are null, as said corporation had been dissolved prior thereto by the foreclosure under a mortgage and sale thereunder of its franchises. If it be conceded that the contention of defendants is correct, it becomes immaterial in view of the judgment in the case of Bumpass, trustee, against Ely, above referred to. In that action the court decree the title of the land to be in Bumpass as trustee, and such judgment was an adjudication to Bumpass, as trustee, of such title as the original company had to the land at that time. Under article 682, Rev. St., upon the dissolution of a corporation the property belonging thereto passes to the directors, to be held in trust by them for the benefit of corporation creditors. When the original corporation was dissolved by the sale of its franchises, etc., under the foreclosure of the International Trust Company's mortgage, the title
254 to all the property not transferred by the foreclosure sale vested in said directors, for the benefit of the corporation creditors; and we are of the opinion that, when one or more of the directors die, the survivors take the whole title subject to the trust (Rev. St. 1879, art. 4264; Perry, Trusts (2d ed.), §§ 343, 412, 492, 493, 499), and that the surviving trustees of the original company were authorized to deal with said property after its dissolution as they deemed proper for the best interest of the company. Especially is this correct when the creditors consent to such action, as in this case. The transfer of the land by Bumpass, trustee, to plaintiffs was done by virtue of an understanding and agreement between the creditors of the original company and the surviving directors

thereof. This was done in the interest and for the benefit of the creditors, and defendants have no ground for complaint in this regard. We therefore hold that plaintiffs are entitled to recover all the land sued for that did not pass by the sale under the mortgage.

This brings us to the consideration of the question whether the Hughes and Slaughter tract and the Mays tract were embraced in the mortgage given by Company No. 1 to the International Trust Company. The record shows that on March 22, 1880, Company No. 1 executed a mortgage to the International Trust Company to secure certain bonds issued by said company. The property covered by said mortgage is described therein as follows: "All and singular the railroad of the party of the first part as the same now is or may hereafter be constructed from its terminus (describing it), including the right of way, road-bed, superstructure, iron, ties, splices, chairs, bolts, nuts, spikes, all lands and depot grounds, station-houses, and depots, viaducts, bridges, timber, and materials and property purchased and to be purchased for the construction and equipment of said road * * * including all appurtenances and appendages of said railroad and the property of said company now acquired, used for and pertaining to the operation of said road." Prior to the execution of the foregoing mortgage said Company No. 1 contracted to purchase the Hughes and Slaughter tract of land, containing 25 acres. The deed to same is dated March 13, 1880, though not delivered until September 5, 1880, when the purchase-money was paid for the land. On February 2, 1881, said company purchased the Mays tract. In 1883, the International Trust Company's mortgage was foreclosed, the judgment of foreclosure describing the property as described in the mortgage. The sale of the property was made under said judgment, and the purchasers at
255 said sale organized under the original charter. This company is designated as Company No. 2 in the record. Company No. 2, becoming involved, was sold out under judgment, and purchased by Jules Schneider and associates, who, on November 13, 1885, reorganized under the original charter, and this company is designated as Company No. 3. On August 30, 1888, Company No. 3 executed a mortgage to the Central Trust Company, the description of the property included in said mortgage being in substance the same as that in the International Trust Company's mortgages. On September 25, 1889, proceedings were instituted in the district court of Dallas county by the attorney general of the State of Texas to forfeit the charter of said road. Venue was changed to Ellis county, and on September 14, 1891, judgment was rendered forfeiting said charter, and appointing John Gaston receiver of same. In 1883, prior to the sale under the International Trust Company's mortgage, a judgment was rendered against said company in favor of Nason and others. In August, 1886, after the dissolution of companies No. 1 and 2, and after the organization of No. 3, an execution by virtue of said judgment was levied upon the entire road, franchises, etc., and on the Hughes and Slaughter tract and the May's tract of land, and said property sold thereunder; E. M. Powell and others be-

coming the purchasers at said sale. Subsequently Powell and others deeded their interests to defendants herein. On September 7, 1891, the Central Trust Company filed in the Federal court at Dallas a bill of complaint against the railroad company for foreclosure of its said mortgage, appointment of receiver, etc. In that proceeding the mortgage was finally foreclosed, the property sold thereunder, and defendants became the purchasers thereof at said foreclosure sale. In said receivership proceedings a judgment was duly rendered cancelling the sale of said property to E. M. Powell and others. Various other proceedings were had in said receivership case, but we deem it unnecessary to mention them here. In addition to the litigation heretofore detailed there were many other suits, receiverships and judgments pertaining to said road that are not necessary to mention here, as they have no controlling effect in the determination of the issues here presented.

It is contended by plaintiff that the description of the land in the judicial decrees of foreclosure upon which defendants' title to the lands depend is too general to identify the land, and that extrinsic evidence will not be heard to show what land was intended. The description of the land contained in the decrees of foreclosure
256 is the same as that contained in the mortgages. The land is not described by metes and bounds, but such as was "purchased and to be purchased for the construction and equipment of said road," or such as was "acquired or which may be acquired in the State of Texas, used for and pertaining to the operation of said railroad." It is admitted by plaintiffs' counsel that in the foreclosure proceedings extrinsic evidence could have been admitted to show what land was intended, but, as that was not done, no title passed by the sale under the decree for the want of a sufficient description, which renders it void. In passing upon a description in a voluntary deed, Mr. Justice Moore, in Kingston *v.* Pickens, 46 Tex. 101, says: "The construction of a deed, being a matter of law, is for the court. If, therefore, the land intended to be conveyed by it be so inaccurately described that it appears on an inspecation of the deed that the identity of the land is altogether uncertain, and cannot be determined, the court should pronounce it void; but when the uncertainty does not appear upon the face of the deed, but arises from extraneous facts, as in other cases of latent ambiguity, parol evidence is admissible to explain or remove it." In Smith *v.* Crosby, 86 Tex. 15, S. W. 10, Stayton, C. J., says: "That extrinsic evidence may be introduced to clearly locate and identify land passing by a sheriff's deed containing an accurate, but general, description, ought not to be controverted, and is not an open question in this court. Wilson *v.* Smith, 50 Tex. 370; Giddings *v.* Day, 84 Tex. 608, 19 S. W. 682. The rule in this respect is the same whether the deed be one executed by a sheriff after a sale under execution, or one voluntarily executed by the owner of the land. * * * The law does not require that in such sales the description must be such that the land may be identified by inspection of the levy and deed; and, if the description be general, but sufficiently accurate to enable parties to identify the land levied upon and conveyed by the use of

such means as would be admissible in a court of justice for that purpose, then the description should be deemed sufficient." In Hermann *v.* Likens, 90 Tex. 448, 39 S. W. 282, Gaines, C. J., says: "What is a certain description in a voluntary conveyance is necessarily certain in a sheriff's or administrator's deed; and it would seem, therefore, that there should be no distinction in this respect between voluntary and involuntary conveyances." We think it clear from the rulings of the decisions from which we have quoted that there is no distinction between voluntary and judicial sales in regard to the ambiguity in the description of the land sought
257 to be conveyed; from which we conclude that, if the description of the land under consideration was contained in a voluntary conveyance, in a suit for a recovery of the land extrinsic evidence would be permissible to show the land intended, though containing only a general description, and that it was proper to show by extrinsic evidence what land upon which the foreclosure was had. The descriptions of the land in the decrees are not "altogether uncertain," as appears from the face of the deed, and therefore not such as authorized the court to determine as a matter of law that no title was conveyed thereby.

It is not seriously contended by defendants that the lands in Dallas, Houston and Kaufman counties, and for which plaintiffs recovered judgment, were so embraced. The contention arises over the Hughes and Slaughter tract and the Mays tract. As to these two tracts the question cannot be determined alone from the description given in the mortgages, and it was proper to resort to extrinsic evidence on the trial. This evidence shows that the Texas Trunk Railroad Company was chartered in 1879 to construct and operate a railroad from Dallas to Sabine pass, with a branch to the Louisiana line,—a distance of about 350 miles. The road was completed from Dallas to Cedar, a distance of about 50 miles. The Hughes and Slaughter and the Mays tracts were purchased after the execution and before the foreclosure of the International Trust Company mortgage. When purchased the former was in the country about one mile from the corporate limits of the city of Dallas. In 1889 the city limits were extended so as to include it, and the streets and street-car lines have been extended along and across it. Said tract of land contains 25 acres, and is 1,680 feet, approximately, north and south, by 650 feet, approximately, east and west. It lies about 1,300 feet south of the Texas & Pacific railroad, the intervening land, being, approximately, in the shape of a flat-iron, and contains about 17 acres, and is referred to in the record as the "flat-iron tract." The Texas Trunk Railroad Company contracted to purchase the "flat-iron tract" of the owner, W. H. Gaston, intending it for a terminal, but the purchase-money was never paid, and no title ever passed to it. Said company built its road, beginning at the Texas & Pacific road, across the west side of the "flat-iron tract" and Hughes and Slaughter tract, the main track being 48 feet at the north end and 25 feet at the south end from the west line of the Hughes and Slaughter tract. A parallel siding was constructed 12 feet east of the main tract,

extending from the Texas & Pacific 1,307 feet across the "flat-iron tract" and into the Hughes and Slaughter tract,
258 joining the main track 434 feet south of the north line. The company bought a small house, 12 x 14 feet, worth about $25, and a small water tank, worth about $75 or $100. These were moved on the land near the north corner west of the main track. The house was used for a ticket office, and the tank to water the engines and cars. Both were intended for use only until permanent buildings should be erected on the flat-iron tract. A car shed, consisting of a plank roof on poles, worth not over $50, was built near the siding. The foundations for a two-stall round-house were also laid, but at what time does not appear. It only appears that the remains were found on the land in 1892. At one time a switch extended from the main track west to a connection with the Santa Fé, but this was taken up when they stopped running to the Santa Fé depot. In 1891 a Y was on the land, extending east from the main track to about the center of the land. It was taken up in 1892. At what time it was placed there is not shown. It was a temporary affair, laid on the surface of the ground without any grading. The railroad company never used or needed more than 12 feet on each side of their track for loading and unloading and delivering freight it actually hauled. The soil was black, waxy, and it was not possible to haul freight to or from that point in wet weather. It was not suited for a freight and passenger terminal. It was shown by expert testimony that this land would be needed and necessary for a terminal if the road was constructed as contemplated and operated as it should be. During the most of the time of its existence the road has used the terminals of other roads entering Dallas, except for the wood business.

The jury found, in answer to special issues submitted relating to the Hughes and Slaughter tract, in substance: that all of said tract, except 100 feet off the west boundary line of same, was originally acquired by the Texas Trunk Railroad Company for the purpose of subdividing the same into lots, and selling the same to employés of the company. That no part of said tract sued for (the 100 feet off the west side not being sued for) was used by said company in connection with the operation of said road at the date of the execution of the International Trust Company mortgage, March 22, 1880. That there was no evidence that any Y existed on the land at the date of the foreclosure of said mortgage on January 31, 1883. That, if any part of said 25 acres was used at that time by said railroad, except said 100 feet on the west boundary, it was only of a temporary character. That there was no
259 evidence that any part of said Y was used by said railroad at the time of the execution of the mortgage to the Central Trust Company on August 30, 1888. That the part of the 25-acre tract sued for and formerly occupied as a Y had been permanently abandoned for such use when the Central Trust Company mortgage was foreclosed on February 26, 1895. That no part of said 25 acres sued for, except the part occupied by the Y, was ever actually used for railroad purposes. That, considering the

reasonable intention and actual or probable and future needs of the railroad company when the International Trust Company's mortgage was executed, no part of said land sued for was reasonably necessary for the construction, equipment, repairs, renewals, improvements, completion, operation, or management of the railroad. That when the Hughes and Slaughter tract was acquired by the railroad company it then was the intention of said company to use the "flat-iron tract" for its terminal, and to place thereon its depots and shops. The Mays tract is 600 feet, approximately, north and south, by 919 feet, approximately, east and west, and contains 11.92 acres, exclusive of railroad right of way. It was deeded to the railroad company on February 2, 1881. This tract is about two miles from the Hughes and Slaughter tract, and is outside of the city limits. Plaintiffs do not sue for a strip 100 feet on each side of the center of the main track of the railroad. The main track of the road runs through this tract, and a switch for sand cars was built on the land, extending at no point more than 75 feet from the main track. Said was used from this track to repair the road-bed, and for surfacing it, and keeping it in order. There is no other place on the road to get sand to ballast the track, except off the right of way. There is no evidence that any sand was taken from the land beyond the 200-foot strip, which is not claimed by plaintiffs, or that any switch was actually put on the land or any sand taken from it, even inside the right of way, prior to September 1, 1891. Said tract of land was never used by said company in any manner other than as above stated. In answer to special issues relating to the Mays tract the jury found that the portion sued for, when originally acquired, the company intended for subdividing into lots, and selling same to employés of the company. The only evidence as to what use the two tracts of land were intended for by the directory of the road at the time acquired by the road is that of Gen. W. L. Cabell, who was a director and vice-president of the road as originally incorporated, and most of the time its manager and acting president.

He testified: "We bought the 25 acres for railroad purposes,—
260 laying down switches, and such things as that, and, if the land was not required, to sell it into lots for the employees to live on. All that was necessary for tracks and switches was to be used for that purpose. When said 25 acres was purchased, it was the intention of the company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots, and let the men employed by the railroad company purchase them, and build residences on them, in order to be close to their work. * * * The Mays tract was bought the same way; that is, the railroad should use whatever was needed for tracks and sand, and the balance was to be divided into lots." It was shown by expert testimony that, if the road was properly constructed and operated, both tracts were necessary, and needed by the company,—the 25-acre tract for terminal purposes, and the 11.92 acres for obtaining sand for ballast, etc. The court, in addition to submitting special issues to the jury as above indicated, also peremptorily charged the jury to

find specially to the effect that the Hughes and Slaughter tract was bought by deed dated March 8, 1880, but not delivered until several months thereafter; that it was the purpose of the company to construct on it its main track, part of its sheds, all necessary switches and side tracks, and, if these did not occupy all the land, then to sell lots on the eastern side of the land to its employés so that they might be near their work; that no such sales have ever been made, nor has any part of the land been subdivided into lots; that the company built its main track across the land near its western boundary, and also built a side track on it, and a Y near the center of it, and extending eastwardly across the land to beyond the center of the land, and also built a small house, used as a ticket office, and a car shed; that it used in the operation of its road up to 1892 the main and side track and houses; that this was the only land the road owned in Dallas where it terminated; that both as originally contemplated and as constructed, if the road had been properly constructed and operated, it would have needed as much as 25 acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of such construction and operation.

The court also peremptorily charged the jury to find specially to the effect that the Mays tract was bought on February 2, 1881; that it had sand on it; that the company intended to use sand in the construction and ballasting of the road, and also to place on the land such switches and side tracks as might be necessary in the
261 operation of the road; that the main *main* track was built across it near its eastern boundary, and also a spur track running out from the main track, but near to it, across the land, so as to reach the sand; that sand has since been taken from the land, and used in the construction and repairing and ballasting of the road; that the road has thus occupied about two acres of the tract; that, if the road were properly constructed and operated, it would be necessary to use sand to do so properly and successfully. The jury returned a verdict in accord with these instructions in addition to the finding on special issues.

The question now presented *it*, was the court, under the evidence and findings of the jury, warranted in rendering judgment for defendants for the Hughes and Slaughter and Mays tracts of land? When, upon a trial, the evidence adduced is such that, as a matter of law, a judgment could be rendered only in one way, then the court is authorized to direct the jury to render a verdict accordingly. But where there is evidence tending to support both sides of the controversy the issues must be submitted to the jury, and judgment rendered in accord with the verdict. If, however, the evidence is insufficient to support the verdict, a new trial should be granted. When the case is submitted on special issues, if there is testimony tending to support the findings of the jury, then it is the duty of the court to render judgment in accord with such findings. We are of the opinion that the evidence did not warrant a verdict for defendants, but warranted the findings of the jury on the issue submitted for their determination. In the case of Shirley *v.* Rail-

way Co., 78 Tex. 136, 10 S. W. 543, the court, in discussing the question as to when a railroad mortgage embraced subsequently acquired property in the absence of a special description, uses the following language: "The authorities are abundant to the effect that whether subsequently acquired property is included in a conveyance executed by a railway company depends upon its being necessary to the enjoyment of the franchise or the operation of the road, in the absence of special description of it in the conveyance. So a conveyance of all its property, real and personal, acquired or to be acquired, owned or to be owned, used or appropriated for operating or maintaining the road does not include lands acquired by the company, and not thus used or employed." Applying the rule here announced that the after-acquired property, to become subject to mortgage, must be "used or employed," then the evidence warrants the conclusion that the International Trust Company mortgage did not embrace the land sued for. There was no use of the 25-acre tract, outside
262 of the 100 feet each way, except that part covered by the Y, and the testimony as to this is too indefinite to impress upon the whole tract the character of having been acquired or used for railroad purposes. Its character must be determined from the conditions that existed before and at the time of the foreclosure of the International Trust Company mortgage; for, if the land was not embraced in said mortgage, the use, if any, made of it by companies No-. 2 and 3, would not affect its status. The evidence does not definitely show when the Y was placed on the ground, and, as the land was not specifically described in the mortgage, but depended upon extrinsic evidence to show that it was embraced therein, and the burden was on defendants to establish that fact, and it not being shown that Company No. 1 built the Y, its being on the land would have no probative force. The only direct evidence as to the intention of the company as to the purposes for which the land was purchased is that of Gen. Cabell. This evidence was objected to on the ground that the intention of the company could not be proven in this manner. If his testimony is to be considered,—and we think it should be,—then we can conclude that part of the land was to be used for railroad purposes and part for dividing into lots and selling to employés of the road. But what part was acquired for either purpose was a matter to be determined by the jury. He says the western part was to be used for the main track, necessary switches, a car shed, etc. The main track, a switch, a car shed, and small ticket office were placed thereon. If the user is to determine the status, then the jury were warranted in concluding that the part used was all that was intended for railroad purposes. If his testimony is not to be considered, then nothing is left but the use to which the land was put to determine whether it was acquired for railroad purposes, except the testimony of the expert witnesses as to what land would be necessary and needed if the road had been constructed as originally contemplated, and properly operated. What was necessary or needed in the opinion of the witnesses was by no means conclusive in determining *what* for what purpose the land

was acquired. The most that can be said of it is that it was simply a circumstance that could be considered by the jury in determining the intention of the directory at the time of its acquisition, and, in the absence of the use of the land for railroad purposes, the mere contention will not control. Land might be acquired by a railroad that would appear to experts to be necessary and needed for railroad purposes, yet, when purchased, no intention existed to put it
263 to such a use, and never used for such purpose. In this case the evidence shows that only a small portion of the land was actually used for railroad purposes, and would not alone be sufficient, as the evidence shows that it was acquired for a double purpose. The jury were authorized to find that Company No. 1 had put to use all that portion it intended for railroad purposes, and intended to sell the balance to its employés to build upon, which latter cannot be held to be for railroad purposes.

Defendants acquired no title by virtue of the conveyance of the land by Powell for the reasons that the sale under execution at which Powell purchased were void, the executions having been levied on the land after the dissolution of Company No. 1, and said land had passed into the directors, as trustees for the benefit of creditors of said company. Again, said deed had been cancelled by a court of competent jurisdiction, where the issue was duly called in question and passed upon, thereby rendering Powell's title of no force. Defendants claim Powell's title through a conveyance made after the rendition of said judgment, and, as Powell had no title to convey, the defendants acquired none by said conveyance.

Holding, as we do, that the lands in controversy were never embraced by the International Trust Company mortgages, it follows that the title to the lands did not pass out of the original company by the foreclosure proceedings of said mortgage, and it is not necessary for us to discuss the other questions presented by the briefs of the parties. In view of the evidence, we think the trial court erred in giving to the jury peremptory instructions to find certain facts. We are also of the opinion that the evidence supports the findings of the jury on the special issues submitted, and that judgment should have been rendered thereon for plaintiffs. The judgment will, therefore, be affirmed as to the lands decreed to plaintiffs, and reversed as to the Hughes and Slaughter and Mays tracts, and here rendered for plaintiffs.

Delievered June 30, 1900.

RAINEY,
Chief Justice.

Filed in court of civil appeals, Jun- 30, 1900.
GEO. W. BLAIR,
Clerk 5th District.

Filed in supreme court Nov. 14, 1900.
CHAS. S. MORSE, *Clerk.*

264 *Judgment of Court of Appeals.*

A. D. ALDRIDGE ET AL. *vs.* E. H. PARDEE ET AL. } No. 2865. From District Court, Dallas County.

SATURDAY, *June 30th*, 1900.

Opinion of the court delivered by Mr. Rainey, chief justice.

This cause comong on to be heard on the transcript of the record and the same being inspected, because it is the opinion of this court that there was no error in the judgment of the court below as to the lands recovered by plaintiffs, it is therefore considered, adjudged and ordered that so much of said judgment be in all things affirmed; and because it is the opinion of the court that there was error in the judgment of the court below as to the Hughes and Slaughter and Mays tracts of land it is therefore considered, adjudged and ordered that the judgment of the court below as to said tracts of land be reversed and judgment is now here rendered as follows: It is ordered, adjudged and decreed by the court that A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downes and associates, plaintiffs in the court below, do have and recover of E. H. Pardee and Collis P. Huntington, defendants in court below, the following-described tracts or parcels of land, to wit: Lying and being situated in Dallas county, Texas, and particularly described as follows: First tract: A part of the John Grigsby survey and being a part of lot No. five (5), in the division of said survey; beginning at the east corner of Jacob Bopp on the southwest line of said lot No. five (5); thence N. 45 E. 650 feet to corner; thence S. 45 E. 1680 feet to corner; thence S. 45 W. 650 feet to said boundary line; thence N. 45 W. with said boundary line 1680 feet to the place of beginning, containing 25 acres more or less and being the same land deeded to the Texas Trunk Railroad Company by W. E. Hughes and wife, Annie E. Hughes, and C. C. Slaughter and wife, Cassie C. Slaughter, by deed bearing date the 13th day of March, 1880, and recorded in vol. 50, page 163, deed records of Dallas county, Texas, except a right of way 100 feet wide on the west or southwest side of said 25-acre tract, being a strip of land 100 feet wide northwest and southeast and 1680 feet long southeast and northwest and lying on and northeast of the southwest boundary line of said 25-acre tract, the title to which strip 100 by 1680 feet is hereby adjudged to said defendants. Second tract. A part of the Thomas Lagow survey; beginning at a bois d'arc post with a R. R. spike driven in it at the S. E. corner of the Mays tract where it joins the S. W. corner of
265 Galliher tract; thence in a N. W. direction along the boundary line between said Mays and said Galliher tracts, 600 feet to stake; thence at right angles to said boundary line of said Mays and Galliher tracts, 919 feet to a stake on the west boundary of said Mays tract; thence at right angles with said last-named line in a S. E. direction along the west boundary of said Mays' land 600

feet to a stake on boundary line between said Mays and J. J. Good's land; thence at right angles with said W. line in an east direction along said boundary line between said Mays and Good to the place of beginning, the same being 11 92/100 acres of land and being exclusive of a right of way 200 feet wide. Being 100 feet on each side of the center of the main track of the original Texas Trunk railroad there it passes through said tract of land; being the same land deeded to the Texas Trunk Railroad Company by S. R. Mays and wife, A. C. Mays, by deed bearing date the 2nd day of February, 1881, and recorded in vol. 48, pages 586, deed records of Dallas county, Texas, for which said two tracts of land plaintiffs in the court below may have their writ of possession. It is further ordered, adjudged and decreed, that said plaintiffs in the court below do have and recover of said E. H. Pardee and Collis P. Huntington defendants in the court below and Andrew Dow and George W. Heyer, their sureties upon appeal bond all costs in this behalf expended both in the court below and in this court for which execution may issue. It is further ordered, that execution issue in favor of the officers of the court against each party respectively for the costs by them in this behalf incurred and this decision be certified below for observance.

Motion of Edward H. Pardee and C. P. Huntington for a Rehearing.

Filed in court of civil appeals July 13, 1900. Filed in supreme court Nov. 14, 1900.

In Court of Civial Appeals, Fifth Supreme Judicial District.

A. D. ALDRIDGE ET AL., Appellants,
vs.
EDWARD H. PARDEE ET AL., Appellees. } No. 2865.

EDWARD H. PARDEE ET AL., Appellants,
vs.
A. D. ALDRIDGE ET AL., Appellees.

Appeal from district court of Dallas county.

266 Now come Edward H. Pardee and Collis P. Huntington and move the court to set aside the judgment herein rendered against them in said cause on the 30th day of June, 1900, and for a rehearing of said cause upon the following grounds, to wit:

First.

This court erred in overruling and refusing to sustain the first assignment of error presented by these appellants in their brief (being No. 2 in the transcript, page 267), which reads as follows: "The court erred in overruling defendants' special demurrer to plaintiffs' first amended original petition, which special demurrer is as follows: 'And for further answer in this behalf the defendants in said cause demur to plaintiffs' first amended original petition

herein, and say that the same is insufficient in law, because it appears therefrom that plaintiffs are not actually interested in the subject-matter of this suit, but are assuming to represent and sue in behalf of others, whose names and interest are not disclosed. And of this defendants pray judgment of the court.'"

Statement.

See the statement and argument in the brief of these appellants, pages 8–10.

Second.

This court erred in overruling and refusing to sustain the assignment of error presented as second in their brief and appearing as fourth and fourteenth in the transcript, pages 267, 277, and reading as follows:

"*Fourth.* The court erred in refusing special charge No. 2, requested by defendants, as follows: 'It appearing that the judgment in the case entitled "W. F. Thompson *v.* Texas Trunk Railroad Company, No. 4333," rendered by the district court of Dallas county, Texas, which has been admitted in evidence before you, was rendered after the defendant corporation was dissolved, you are instructed to exclude said judgment from consideration in arriving at your verdict.'"

"*Fourteenth.* The court erred in admitting in evidence, over the objection of defendants, that part of the agreement as to certain facts between the parties to this cause, which showed that on March 15th, 1887, in the suit of W. F. Thompson against The Texas Trunk Railroad Company, No. 4333, upon the docket of the district court of Dallas county, Texas, judgment was rendered in favor of
267 Charles Vidor and John Wolston, as assignees of plaintiff, W. F. Thompson, and as surviving partners of Wolston, Wells & Vidor, against the Texas Trunk Railroad Company, for the sum of $4250, besides costs, and besides foreclosing attachment lien, as fully shown by defendants' bill of exception No. 1."

Statement.

See proposition, statement, authorities and argument presented under said assignment in appellants' brief, pages 10–13.

Third.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as third in their brief and appearing as fifth, fifteenth and sixteenth in the transcript, pages 267–271, and reading as follows:

"*Fifth.* The court erred in refusing special charge No. 3 requested by defendants, as follows: 'You are instructed to exclude from consideration in arriving at your verdict in this case the evidence of the execution issued upon a judgment of W. F. Thompson *v.* Texas Trunk Railroad Company, in the district court of Dallas county,

Texas, and of the levy of said execution, and sale and deed made in pursuance thereof which has been admitted in evidence before you on behalf of the plaintiffs herein.' "

"*Fifteenth.* The court erred in admitting in evidence over defendants' objection that part of said agreement of the parties which shows that on March 19, 1895, and alias general execution was issued to Dallas county on or by virtue of the judgment of the district court of Dallas county, entered as of March 15th, 1887, in cause No. 4333 upon its docket, entitled W. F. Thompson *v.* Texas Trunk Railroad Company, and showing that said execution was levied on the same day on so much of the lands described in plaintiffs' first amended original petition as are located in Dallas county; and that on April 2nd, 1895, said lands were sold to C. C. Bumpas, trustee, for J. E. Downes and associates, and that the sheriff, in pursuance of said execution and sale, executed deed for said lands to C. C. Bumpas, as such trustee, as fully shown in defendants' bill of exceptions No. 2."

"*Sixteenth.* The court erred in admitting in evidence over defendants' objection that part of said agreement between the parties to this cause, which showed that on August 3d, 1895, a pluries general execution was issued to Houston county, on or by virtue of the judgment of the district court of Dallas county, Texas, entered as of March 15th, 1887, in cause No. 4333 upon its docket, entitled W. F. Thompson *v.* Texas Trunk Railroad Company, and showing that such execution was levied on September 6th, 1895, on so much of the lands described in plaintiffs' first amended original petition as are located in Houston county; and that on October 1st, 1895, said lands were sold under execution and levy by the sheriff to C. C. Bumpas, trustee for J. E. Downes and associates, and that the sheriff in pursuance of such execution and sale executed deeds for said land to said Bumpas as such trustee, as fully set forth in defendants' bill of exceptions No. 3."

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Statement.

See proposition, statement and authorities in support of said assignment in appellants' brief, pages 14–17.

Fourth.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as fourth in their brief and appearing as sixth, ninth and eighteenth in the transcript, pages 268, 269 and 272, and reading as follows:

"*Sixth.* The court erred in refusing special charge No. 4 requested by defendants as follows: 'You are instructed that the judgment of the district court of Dallas county in and for the forty-fourth judicial district, in favor of C. C. Bumpas, as trustee for J. E. Downes and associates, rendered A-ril 7th, 1898, in cause No. 14,047, entitled C. C. Bumpas *vs.* John F. Ely *et al.*, in so far as the same is against John F. Ely, James B. Simpson, W. L. Cabell and D. A. Robinson as surviving directors and trustees of the Texas Trunk Rail-

road Company as originally incorporated, etc., is void, and you will exclude same from consideration in arriving at your verdict in this case.'"

"*Ninth.* The court erred in refusing special charge No. 7 requested by defendants as follows: 'You are instructed that the deeds executed by James B. Simpson, John F. Ely, D. A. Robinson and W. L. Cabell as directors and trustees of the Texas Trunk Railroad Company, to C. C. Bumpas, trustee, etc., which have been admitted in evidence before you are void and will exclude the same from consideration in arriving at your verdict in this case.'"

"*Eighteenth.* The court erred in admitting in evidence over defendants' objections that part of said agreement between the parties to this cause which showed that on December 28th, 1897, James B. Simpson, D. A. Robinson, John F. Ely and W. L. Cabell, as directors and trustees of the Texas Trunk Railroad Company as incor-
269 porated on the 6th day of November, 1879, executed to C. C. Bumpas, trustee for J. E. Downes and associates, for a recited consideration 'of the sum of one dollar and other valuable considerations' a deed without warranty conveying to said Bumpas, as trustee, the lands located in Dallas county described in plaintiffs' first amended original petition in this cause, and 'also all other lands in Dallas county, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company,' and showing also that on same day deeds were executed in the same form by same grantors to the same grantee conveying the Kaufman and Houston county lands described in plaintiffs' first amended original petition in this cause, and also conveying generally all other lands in Houston and Kaufman counties, Texas, deeded to or formerly owned by said Texas Trunk Railroad Company as fully set forth in defendants' bill of exceptions No. 5."

Statement.

See proposition, statement, authorities and argument in support of said assignment in appellants' brief, pages 18–33.

Fifth.

This court erred in holding that powers vested by statute in a board of nine directors without any provision authorizing the survivors to act may be exercised otherwise than as a board, and that too by the survivors after the death of a majority of the directors or trustees.

Statement.

See statement, authorities and argument in appellants' brief, pages 18–33.

Sixth.

This court erred in not holding that a judgment rendered against only four of a board consisting of nine directors or trustees of a sold-out railroad corporation after the death of the other five members was absolutely void.

Statement.

See statement in appellants' brief, pages 18–20.

Authorities.

Rev. Stat. 1895, arts. 4379, 4386, 4416, 4549, 4555, 4556.
Witherspoon *vs.* T. P. R'y Co., 48 Tex., 309.
Quinlan *vs.* H. & T. C. R'y Co., 89 Texas, 356, 380.

Seventh.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as fifth in their
270 brief, and appearing as twelfth and thirteenth in the transcript, page 270, and reading as follows:

"*Twelfth.* The court erred in refusing the thirteenth special charge as requested by defendants, as follows: 'It -ppearing from the uncontradicted evidence that the deeds executed by W. L. Cabell, John F. Ely, J. B. Simpson and D. A. Robinson, as trustees of the sold-out Texas Trunk Railroad Company, to C. C. Bumpas, as trustee, etc., which have been introduced in evidence were without consideration and in abdication and violation of the trust vested in the said Cabell, Ely, Simpson and Robinson by law, and in abuse of said trust, you are instructed to disregard said deeds in arriving at your verdict.'"

"*Thirteenth.* The court erred in refusing the fourteenth special charge as requested by defendants, as follows: 'It appearing from the uncontradicted evidence that the judgment in cause No. 14047, entitled C. C. Bumpas, trustee, etc., *v.* John F. Ely *et al.*, rendered by the forty-fourth judicial district court of Dallas county, Texas, on April 7th, 1898, was as between said C. C. Bumpas, plaintiff therein, W. L. Cabell, John. F. Ely, J. B. Simpson, D. A. Robinson, as trustees of the sold-out Texas Trunk Railroad Company, *was* with the acquiescence and consent of said trustees in pursuance of the previous abdication and violation of their trusts by the deeds, executed by them to C. C. Bumpas, trustee, (which deeds you are also instructed to disregard) you are instructed to disregard said judgment in arriving at your verdict.'"

Statement.

See proposition, statement, authorities and argument in support of said assignment as contained in appellants' brief, pages 34–42.

Eighth.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as sixth in their vrief, and appearing as eighth in the transcript, page 268, and reading as follows:

"The court erred in refusing special charge No. 6 requested by defendants, as follows: 'You are instructed that the judgment of the district court of Dallas county, Texas, in and for the forty-fourth ju-

dicial district, rendered April 7th, 1898, in cause No. 14047, entitled "C. C. Bumpas *v.* John F. Ely *et al.*," which has been admitted in evidence before you, is inadmissible as evidence of title in plaintiffs, and you will exclude the same from consideration in arriving at your verdict in this case.'"

271 *Statement.*

See proposition, statement and argument in support of said assignment as contained in appellants' brief, pages 42–47.

Ninth.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as seventh in their brief and appearing as nineteenth in the transcript, page 273, and reading as follows:

"The court erred in charging the jury as follows: 'As to all of the land sued for except the 25 acres bought from Hughes & Slaughter, and described as tract No. *d* in plaintiffs' petition, you will find for the plaintiffs, leaving out the right of way over all said land, and as to these tracts the form of your verdict will be as follows: "We, the jury, find for the plaintiffs all the land sued for save and except the right of way of the Texas Trunk railroad through the towns of Kaufman and Crandall, as shown on the maps of said towns recorded in volume 50, page 163, and volume 33, page 606, of the deed records of Kaufman county, Texas, and save and except the right of way, 100 feet in width, on each side of *the* certain of the main tract of the Texas Trunk railroad where it may cross any of said land, and also save and except the 25-acres tract bought from Hughes & Slaughter, and described as tract No. *b* in plaintiffs' petition, and the 11 92/100-acre tract bought from Mays and wife, and described as tract No. *d* in plaintiffs' petition."'"

Statement.

See statement under said assignment as presented in appellants' brief, page 48.

Tenth.

This court erred in overruling and refusing to sustain the assignment of error presented as eighth in their brief, and appearing as tenth in the transcript, page 269, and reading as follows:

"The court erred in refusing special charge No. 8, requested by defendants, as follows: 'You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered on the 31st day of January, 1883, foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company, as trustee, and ordering the sale of the property embraced in said mortgage, and the subsequent decree of said court in said cause, rendered on June 6th, 1883, which decrees have been introduced in evidence before you, and the
272 sales made under and in pursuance of said decrees, embraced the property sued for in said cause, and were effectual to vest

title to the same in those under whom the defendants claim, and you are therefore instructed to return a verdict in favor of the defendants.'"

Statement.

See statement, and authorities under said assignment as presented in appellants' brief, pages 49–51.

Eleventh.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as ninth in their brief and appearing as eleventh in the transcript, page 269, and reading as follows:

"The court erred in refusing special charge No. 9, requested by defendants, as follows: 'You are instructed that the decree of foreclosure and sale rendered by the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 193 upon its equity docket, foreclosing the mortgage previously executed by the Texas Trunk Railroad Company to the Central Trust Company of New York, as trustee, and ordering the sale of the property conveyed by said mortgage, and the sale made under and in pursuance of said decree to defendant, Edward H. Pardee, embraced the property involved in this suit, and was effectual to vest the title to said property in said Edward H. Pardee, and you are therefore instructed to return a verdict in favor of the defendants.'"

Statement.

See statement in support of said assignment as contained in appellants' brief, pages 51–52.

Twelfth.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as tenth in their brief and appearing as twenty-second in the transcript, page 275, and reading as follows:

"The court erred in refusing the twelfth special charge as requested by defendants, which special charge is as follows: 'You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 275, upon the equity docket, in favor of George T. Atkins, as receiver, etc., and against C. T. Campbell, *et al.*, rendered on July 16th, 1895, which, with the original bill of complaint in said cause, has been in-
273 troduced in evidence before you, was effectual to establish and bring into the custody of said court, through George T. Atkins, as receiver, in equity cause No. 193 upon the docket of said court, the two tracts of land described in plaintiffs' first amended original petition in this case; that is to say, the twenty-five-acre tract described by metes and bounds in subdivision (*b*), and the 11.92-acres tract described by metes and bounds in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this

cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land.' "

Statement.

See proposition, statement, authorities and argument in support of said assignment as presented in appellants' brief, pages 53–59.

Thirteenth.

This court erred in overruling and refusing to sustain the assignment of error presented by these appellants as eleventh in their brief and appearing *and* twenty-eighth in the transcript, page 277, and reading as follows:

"The court erred in not holding, and in not rendering judgment in favor of defendants upon the ground that the sale of the second and fourth tracts of land described in plaintiffs' first amended original petition, that is to say, the 25-acre tract described by metes and bounds in subdivision (*b*) and the 11 92/100-acre tract described by metes and bounds in subdivision (*d*) of plaintiffs' said petition, made by the sheriff of Dallas county to E. M. Powell and associates, under and by virtue of executions and orders of sales issued on judgments rendered by the district court and county court of Dallas county against the Texas Trunk Railroad Company, as originally existing, was sufficient to and did vest in said E. M. Powell and associates, under whom defendants claim the title to the two tracts of land above referred to."

Statement.

See statement and argument in support of said assignment as presented in appellants' brief, pages 59–62.

Fourteenth.

This court erred in holding that the cancellation of the sheriff's deed to E. M. Powell and associates by decree of the circuit court of the United States for the northern district of Texas, at Dallas, in cause No. 275, upon its equity docket, entitled "George T. Atkins, receiver, etc., *vs.* C. T. Camobell *et al.*," inured to the benefit of plaintiffs in this case who were not parties to that suit, or to any one except the complainant in that case and the defendants in this suit who claim under him.

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Statement.

See the decree in that cause as contained in the record, pages 149–152. Plaintiffs in this suit were not parties to that suit and claimed under no one who was a party to it, and we submit that they can derive no rights under it.

Fifteenth.

This court erred in holding that plaintiffs showed any title to and were entitled to recover any of the lands involved in this suit.

Sixteenth.

This court erred in holding that all the creditors of the original Texas Trunk Railroad Company consented to the conveyances by the surviving directors or trustees to Bumpas, trustee, and to the rendition of the judgment in favor of Bumpas against said surviving trustees to the relinquishment by said surviving trustees of their trust to the said Bumpas, or to the plaintiffs in this case because the evidence fails to show that any of such creditors so assented esc-pt those represented by counsel for plaintiffs in this case.

Statement.

There is no evidence in the record to show any consent or any action indicating consent to such transaction by any of the creditors of the original Texas Trunk Railroad Company except those represented by the counsel for the plaintiffs in this case.

Seventeenth.

This court erred in finding and holding that the "Hughes and Slaughter tract" and the "Mays tract" were not covered by the mortgage of the original Texas Trunk Railroad Company to the International Trust Company, and the decree foreclosing the same and did not pass to the purchaser at the sale made in pursuance of such foreclosure decree because the uncontroverted evidence showed that both of said tracts were covered by said mortgage and embraced in the decrees foreclosing the same and passed to the purchasers at the sale made in pursuance of said decree.

Statement.

See the testimony of the witness W. M. Johnson, (Record 167–176); W. L. Cabell, (Record 178–184), W. H. Gaston, (Record 190–
275 193), and Wm. Whyte, (Record 193–198). The testimony (all of which is uncontroverted upon this point) is summarized in the brief of Pardee and Huntington upon the appeal of A. D. Aldridge, *et al.*, (pages, 57–80) and we urge the court to re-examine the same. We beg also to refer to the authorities and argument as contained in the same brief, (pages 88–109).

Eighteenth.

This court erred in finding that "the railroad company never used or needed more than twelve feet on each side of their track for loading and unloading and delivering freight it actually hauled. The soil was black waxy, and it was not possible to haul freight to or from that point in wet weather. It was not suited for a freight and passenger terminal." Because said finding is contrary to all and in unsupported by any evidence in the record.

Statement.

See the testimony of W. M. Johnson (Record 167–176) and of Wm. Whyte (Record 193–198). See also the map prepared by plaintiffs' witness Johnson and contained in the record, (pages 168–169).

Nineteenth.

This court erred in sustaining the finding of the jury (if it meant so to do) to the effect that all of the Hughes and Slaughter tract, except 100 feet off the west boundary line of same, was originally acquired by the Texas Trunk Railroad Company for the purpose of subdividing the same into lots and selling the same to employés of the company, because said finding is contrary to and is unsopported by any evidence in the record.

Statement.

Plaintiffs' own witness, Cabell, testified as follows, (Rec. 180–'1): "We bought the 25 acres for railroad purposes, laying down switches and such things as that, and if the land was not required, to sell it into lots for the employés to live on. *All that was necessary for the tracks and switches was to be used for that purpose.* When such twenty-five acres was purchased it was the intention of the company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots and let the men employed by the railroad company purchase them and build residences on them in order to be close to their work. That was the intention of the road, *and at the same time they were to use all that was necessary for switches and tracks and*
276 *such things as that.* There was an old well on the 25-acre tract when we purchased it. All the land east of the well was to be sold off into lots. That was the understanding between us. That was our idea." Reference to the map prepared by plaintiffs' witness, Johnson, and contained in the record, shows the well referred to by General Cabell and shows that it is outside of the 100-foot strip which the plaintiffs have graciously allowed the defendants to hold. It was — evidence *in* from his testimony that General Cabell went quite as far as he could in his testimony to support the plaintiffs' case, and went much further than any other witness. Still he falls far short of supporting the verdict of the jury or the finding of this court in this particular. Aside from the location of the well General Cabell testified positively that it was their idea that all the property east of the well might be disposed of to employés, yet, "*at the same time they, the company, were to use all that was necessary for switches and tracks and such things as that,*" (Record 180–181). That, he says, was the intention of the company in purchasing the land. The testimony of Superintendent Whyte and of plaintiffs' witness Johnson, which was uncontroverted, showed that *all* of the 25-acre tract was "necessary for switches and tracks and such things as that." See testimony of Johnson, (Rec. 172–'4), and Whyte, (Rec. 193–'6).

Twentieth.

This court erred in sustaining the finding of the jury (if it meant so to do) to the effect that no part of the said 25-acre tract was used by said company in connection with the operation of said road at the time of the execution of the International Trust Company mortgage March 22nd, 1880, because there was no evidence to sustain the

finding, and also because it was immaterial whether said property was so used at said time or not inasmuch as said mortgage distinctly covered "after-acquired" property, (see the mortgage, Record 105).

Twenty-first.

This court erred in sustaining the finding of the jury (if it meant so to do) to the effect that if any part of said 25 acres was used at the time said mortgage was executed "it was only of a temporary character," because it was not necessary in order to make said mortgage applicable to said property that such use should be at that time of a permanent character.

Twenty-second.

277 This court erred in sustaining the finding of the jury (if it meant so to do) to the effect that there was no evidence that any part of the "Y" was used at the time of the execution of the mortgage to the Cenyral Trust Company on August 30th, 1888, because it was not necessary, in order to make said mortgage applicable to said property, that such "Y" should have been in use at that time.

Twenty-third.

This court erred in sustaining the finding of the jury (if it meant so to do) to the effect that the part of the 25-acre tract formerly occupied as a "Y" had been permanently abandoned for such use when the Central Trust Company mortgage was foreclosed on February 26th, 1895, because (1) the evidence does not sustain such finding; (2) if the evidence should be deemed sufficient to sustain such finding, still the fact that the property was not required for a "Y" did not tend to prove that it was not required for other railroad purposes, and its use was not limited to a "Y"; (3) the mortgage having once applied to the property it was immaterial whether the property was actually used on February 26th, 1895, for railroad purposes or not; and (4) the evidence showed that all said property during all the time was property required for railroad purposes.

Twenty-fourth.

This court erred in sustaining the finding of the jury (if it meant so to do) to the effect that no part of said 25 acres sued for, except the part occupied by the "Y," was ever actually used for railroad purposes, because such finding is absolutely contrary to all the evidence and is without any support in the evidence in the record.

Statement.

This finding illustrates the utter disregard of the evidence by the jury in the findings in response to the special issues formulated by plaintiffs. Plaintiffs' own map, as contained in the record, (page 169) shows a number of railroad structures on the property, and all the witnesses agree that at different times various portions of it were

used in connection with the operation of the railroad. See the testimony of W. M. Johnson (Rec. 167–176), W. L. Cabell, (Rec. 178–183), W. H. Gaston, (Rec. 190–193), Wm. Whute, (Rec. 193–198).

Twenty-fifth.

This court erred in sustaining the finding of the jury (if it meant so to do), that, considering the reasonable intention and actual
278 or probable present and future needs of the railroad company when the International Trust Company's mortgage was executed, no part of the land sued for was reasonably necessary for the construction, equipment, repairs, renewal, improvement, completion or operation of the railroad, bevause such finding is absolutely contrary to the uncontroverted evidence in the record and is without any support in the evidence.

Statement.

See the testimony of the witnesses W. M. Johnson, (Rec. 167–176), W. L. Cabell (Rec. 178–183), W. H. Gaston (Rec. 190–193), Wm. Whyte (Rec. 193–198).

Twenty-sixth.

This court erred in finding that W. L. Cabell testified with respect to the Hughes & Slaughter tract that when said 25 acres were purchased it was the intention of the company to use whatever was "necessary on the west side of the *track* for tracks and switches and the land on the east side — this was intended to be laid off into lots," etc. Because said Cabell testified that the *q*estern portion of the "tract" was to be used f*i*r railroad purposes and not merely that on the west side of the railroad "track" was to be so used, and also testified that while it was the idea of the managers at that time that the eastern portion of the tract might be sold to employés, yet "at the same time they, the company, were to use *all* that was necessary for switches and tracks and such things as that," (see testimony, Rec. 180).

Twenty-seventh.

This court erred in holding that "there was no use of the 25 acres outside of the 100 feet each way, except that part covered by the 'Y,' and the testimony as to this is too indefinite t*p* impress upon the whole tract the character of having been acquired or used for railroad purposes." Because the uncontroverted evidence showed that the company did noeed the entire tract, and also showed that it had been used by the company at the time of the foreclosure of the first mortgage otherwise than for the "Y;" and, moreover, it was acquired by the company for railroad purposes.

Statement.

See the testimony of W. M. Johnson (Rec. 171–174), Wm. Whyte, (Rec. 193–198).

Twenty-eighth.

This court erred in holding with reference to said tract of land that "its character must be determined from the conditions that existed before and at the time of the foreclosure of the Inter-
279 national Trust Company mortgage, etc. Because said mortgage covered after-acquired property purchased for the use of said company for railroad purposes and pertaining to the construction, maintenance and operation of its railroad.

Statement.

See description of the property contained in the mortgage, Record 105–106.

Twenty-ninth.

This court erred in holding that the burden was upon the defendants to show by extrinsic evidence that the property in question was covered by the mortgage.

Authorities.

Seguin *vs.* Maverick, 24 Texas, 526;
Knevals *vs.* F. C. & P. R. Co., 66 Fed. Rep., 224, 229.

Thirtieth.

This court erred in holding that, "In this case the evidence shows that only a small portion of the land was actually used for railroad purposes and would not alone be sufficient, as the evidence shows that it was acquired for a double purpose. The jury were authorized to find that Company No. 1 had put to use all that portion it intended for railroad purposes, and intended to sell the balance to its employés to build upon, which latter cannot be held to be for railroad purposes." Because said holding is contrary to and is without any support in the evidence.

Statement.

The evidence does not show that the property was acquired for a "double purpose." The testimony of General Cabell, the witness most favorable to plaintiffs, shows that the property was acquired for railroad purposes, and that if it should turn out that there was more than necessary for such purposes, then the rest should be sold to employés, etc. His language is: "We bought the twenty-five acres for railroad purposes, laying down switches and such things as that, and if the land was not required, to sell it into lots for the employés to live on. All that was necessary for the tracks and switches was to be used for that purpose. When said twenty-five acres was purchased it was the intention of the company to use whatever was necessary on the west side of the track for tracks and switches," etc. And again: "That was the intention of the road, and at the same time, they were to use all that was necessary for switches and tracks

and such things as that," (Record 180–181). Again he said:
280 "The Mays tract was bought the same way; that is, the railroad used whatever was needed for tracks and sand, and the balance was to be divided up into lots," (Rec. 181). The testimony of other witnesses, particularly of Superintendent Whyte and plaintiffs' witness Johnson, showed that all of both tracts were needed for railroad purposes, not only for the line as originally contemplated, but for the line as actually constructed.

We submit that the conslusion of this court that the jury was authorized to find that the company had put to use all that portion it intended for railroad purposes when the mortgage of the International Trust Company was foreclosed is wholly unwarranted. The road was then in its infancy. It had no yards, shops, or any suitable facilities for a line of railroad, such as this was when the mortgage was executed or when it was foreclosed. It ought not to be assumed that the enterprise was abandoned and the road was to go to ruin, and without such assumption it could not be supposed that it would not require this land. Moreover, no other inference can be drawn from the evidence and from all the circumstances than that much more than the 100-foot strip was then in actual use by the company for railroad purposes.

Thirty-first.

This court erred in holding that the district court was not warranted in instructing the jury peremptorily to find the facts recited in subdivisions (2) and (3) of his charge, (Rec. 85–87) respecting the Hughes & Slaughter tract and the Mays tract, and in holding that the giving of said charge was error. Because said facts were established by the undisputed evidence in the case, and that being true it was the duty of the court, if submitting the case to the jury at all, to give such peremptory instructions in regard thereto.

Statement.

See the charges referred to, (Rec. 25–27) and the evidence of the witnesses Cabell, Johnson, Gaston and Whyte as contained in the record, and which is summarized in the brief of Pardee and Huntington filed as appellees upon the appeal of A. D. Aldridge *et al.*, pages 57–80, and see the authorities cited at page 80 of that brief, and particularly the case of Silliman *vs.* Gano, 90 Texas, 646.

Thirty-second.

This court erred in not holding that upon the uncontroverted facts respecting the Hughes & Slaughter tract and the Mays
281 tract recited in subdivisions (2) and (3) of the court's charge to the jury (Record 25–27) that it was the duty of the court below to render judgment in favor of defendants for said tracts of land without regard to the other findings of the jury, and in reversing, under such circumstances, the judgment of the court below in defendants' favor for said two tracts of land and rendering judgment therefor in plaintiffs' favor.

Statement.

See the testimony of the witnesses Johnson, Cabell, Gaston and Whyte as summarized and quoted in the brief filed by Huntington and Pardee as appellees upon the appeal of A. D. Aldridge *et al.* (pages 57–80).

Thirty-third.

This court erred in holding that the authority of Shirley *vs.* Waco Tap R. Co., 78 Texas, 136, in effect that whether subsequently acquired property is included in a conveyance executed by a railway company depends upon its being *necessary* to the enjoyment of the franchises or the operation of the road in the absence of a special description of it in the conveyance. We respectfully submit that such is not the law. The case cited has been virtually overruled in Quinlan *vs.* H. & T. C. R'y Co., 89 Texas, 356, 379. A tract of land may not be "necessary" to the actual construction of the road, the running of trains or the operation of the road generally, yet it may be used to increase the facilities afforded to the public, to economize the expense of operation or maintenance of the road, etc., and, if so, we submit with confidence that if actually acquired for that purpose and in good faith intended to be so used it would be covered by a mortgage in the terms used in the mortgages in question in this case. The view adopted by this court limits the railroad companies to the property actually *necessary* to the maintenance of the road and the running of the trains, cutting off all right to acquire land to improve the facilities for the public, cheapen the cost of maintenance and operation and provide for increasing demands of growing population and traffic. Indeed, it does more. The effect of the judgment in this case is to hold that a railroad company without a foot of ground outside of a narrow right of way in perhaps the most populous and thriving city in the State, and the terminus of its line, cannot hold or mortgage as a part of its road a piece of ground that the uncontroverted testimony of all the witnesses shows is necessary for the terminals, yards and other facilities and is adapted to that purpose.

282 Thirty-fourth.

This court erred in not affirming the judgment of the district court in favor of these defendants for the Hughes & Slaughter tract and the Mays tract.

Statement.

See the statement, authorities and argument contained at pages 84–109 of the brief filed by Huntington and Pardee as appellees upon the appeal of A. D. Aldridge *et al.*

Thirty-fifth.

This court erred in not holding that inasmuch as the Hughes & Slaughter tract and the Mays tract were in the custody of the circuit court of the United States, through its receiver, as determined by

the decree of that court in the foreclosure receivership cause, as well as in cause No. 275 upon its equity docket, entitled "George T. Atkins, receiver, *vs.* C. T. Campbell *et al.*," the jurisdiction of that court was exclusive, and that its decree was not subject to collateral attack as in this case by plaintiffs, and in not affirming upon that ground the judgment of the district court awarding said tracts to defendants.

Statement.

See proceedings of the Federal court as stated and contained in the record, (pages 149–150, 220, 230) and the authorities cited at page 56 of the brief filed by these appellants.

Wherefore, Edward H. Pardee and Dollis P. Huntington pray that the judgment of this court rendered in pursuance of its opinion delivered June 30th, 1900, affirming the judgment of the district court in so far as it was against these defendants and appellants and reversing it and rendering it against them in so far as it was in their favor, be set aside and a rehearing be granted them, and that upon such rehearing the judgment of the district court, in so far as it is in their favor be affirmed, and that in so far as it was against them—be reversed and rendered in their favor. They represent that plaintiffs A. D. Aldridge and A. F. Hardie reside in Dallas county, Texas, but the residence of plaintiff W. G. Mowry is unknown to them; and that Dickson & Moroney, Alexander, Clark & Thompson and W. J. Moroney, all of whom reside in the city and county of Dallas, Texas, are each attorneys of record in this case for the said Aldridge, Hardie and Mowry, trustees.

W. J. J. SMITH,
283 BAKER, BOTTS, BAKER & LOVETT,
Attorneys for Edward H. Pardee and Collis P. Huntington.

Filed in court of civil appeals, Jul- 13, 1900.
GEO. W. BLAIR,
Clerk, 5th District.

Filed in supreme court Nov. 14, 1900.
CHAS. S. MORSE, *Clerk.*

The following motions were submitted to the court for disposition:

Order Submitting Motion for Rehearing, Oct. 5th, 1900.

* * * * * * *

E. H. PARDEE ET AL.
vs.
A. D. ALDRIDGE ET AL. } No. 2613, 2865.

* * * * * * *

Order Overruling Motion for Rehearing, October 13th, 1900.

A. D. ALDRIDGE ET AL.
vs.
E. H. PARDEE ET AL. } No. 2865.

SATURDAY, *October 13th*, 1900.

This day came on to be heard the motion of appellees for a rehearing in this cause, and the same being inspected, it is considered, adjudged and ordered that the said mption be overruled.

Certified Copy of Judgment in Supreme Court.

Filed in Court of Civil Appeals Jan. 26, 1901.

In Supreme Court of Texas, 5th District.

E. H. PARDEE ET AL.
vs.
A. D. ALDRIDGE ET AL.

JAN. 24, 1901.

This day came on to be heard the application of E. H. Pardee *et al.* for a writ of error to the court of civil appeals for the 5th district, and the same having been duly considered, it is ordered that said application be refused; that the applicants Edward H. Pardee and C. P. Huntington pay all costs on this application.

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by said court on said application for a writ of error.

Witness my hand and the seal of said court, this the 24th day of Jan'y, A. D. 1901.

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[L. S.]

CHAS. S. MORSE, *Clerk*,
By F. T. CONNERLY, *Deputy*.

Filed in court of civil appeals Jan. 26, 1901.

GEO. W. BLAIR, *Clerk*.

Certified Copy of Bill of Costs in Supreme Court.

Filed in Court of Civil Appeals Jan. 26th, 1901.

Clerk's Office, Supreme Court.

EDWARD H. PARDEE ET AL.
vs.
A. D. ALDRIDGE ET AL. } No. 2824. Certified Copy Bill of Costs, Supreme Court.

Filing application	.50
Docketing petition	.50
Entering appearance of counsel	.50
Filing two briefs	.60

Filing three papers.....	.90
Entering orders.....	.50
Entering judgment on application	1.00
Certified copy of judgment.....	1.00
Taxing costs of application.....	.50
Certified copy bill of costs..	1.00
Total.....	$7.00

I, Charles S. Morse, clerk of the supreme court of Texas, hereby certify that the above copy of the original bill of costs is true and correct.

Witness my hand and the seal of said court, at Austin, this the 24th day of January, 1901.

[L. S.] CHAS. S. MORSE, *Clerk.*

Filed in court of civil appeals Jan. 26, 1901.

GEO. W. BLAIR, *Clerk.*

Writ of Error Bond.

Filed in court of civil appeals June 21st, 1901.

Approved June 21st, 1901.

Know all men by these presents: that we, Edward H. Pardee and Arabella D. Huntington, executrix, and Chas. H. Tweed and Isaac E. Gates, executors, of the last will and testament of Collis P. Huntington, deceased, and Andrew Dow and Geo. W. Heyer as principals and H. Henke and C. H. Miley as sureties are held and firmly bound unto A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. W. Downs and associates, in the full and just sum of five thousand ($5,000.00) dollars, to be paid to the said A. D. Al-
285 dridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downs and associates, their executors or assigns, for which payment well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals and dated this 21" day of June in the year of our Lord one thousand nine*teen* hundred and one.

Whereas, lately, at a term of the court of civil appeals in and for the 5th supreme judicial district of Texas, in the suit pending in said court between A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downs and associates, as plaintiffs, and Edward H. Pardee and Collis P. Huntington defendants, a judgment was rendered against Edward H. Pardee and Collis P. Huntington for certain lands and premises, in said judgment described, and against Andrew Dow and Geo. W. Heyer the sureties on the appeal bond of said Edward H. Pardee and Collis P. Huntington, and the said Edward H. Pardee and Arabella D. Huntington, executrix, and Chas. H. Tweed and Isaac E. Gates, executors of the last will and testa-

ment of Collis P. Huntington, deceased, and said Andrew Dow and Geo. W. Heyer having obtained a writ of error and filed a copy thereof in the clerk's office of said court to reverse the judgment in the aforesaid cause, and a citation directed to the said A. D. Aldridge, A. F. Hardie and W. G. Mowry trustees for J. E. Downs and associates, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington within thirty days from the date hereof.

Now, the condition of the above obligation is such that if said Edward H. Pardee and said Arabella D. Huntington, executrix, and Chas. H. Tweed and Isaac E. Gates, executors, of Collis P. Huntington, deceased, and said Andrew Dow and Geo. W. Heyer shall prosecute their writ of error to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

EDWARD H. PARDEE.
ARABELLA D. HUNTINGTON,
CHAS. H. TWEED,
ISAAC E. GATES,
Executors of the Last Will and Testament of Collis P. Huntington, Deceased.
ANDREW DOW,
GEO. W. HEYER,
By JAS. A. BAKER,
R. S. LOVETT, AND
286 W. J. J. SMITH, *Their Attorneys.*
H. HENKE.
C. H. MILEY.

Approved this 21 day of June, 1901.
ANSON RAINEY,
Chief Justice of the Court of Civil Appeals in and for the 5th Supreme Judicial District of Texas.

THE STATE OF TEXAS, }
County of Harris. }

I, J. B. Williams, clerk of the district court in and for the county of Harris, do hereby certify that H. Henke and C. H. Miley, whose names appear signed to the annexed bond are in my opinion good and ample security for the amount therein specified, and that if said bond was presented to me for approval, the same would be accepted and approved.

To certify which, I hereunto set my hand and official seal this 20 day of June, 1901.

J. B. WILLIAMS,
Clerk District Court, Harris County, Texas,
[L. S.] By E. H. DUMBLE, *Deputy.*

Filed in court of civil appeals, Jun- 21, 1901.
GEO. W. BLAIR, *Clerk.*

Duplicate Writ of Error to U. S. Supreme Court.

Filed in court of civil appeals June 21st, 1901.

(Duplicate.)

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals in and for the 5th supreme judicial district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals in and for the 5th supreme judicial district of Texas, before you or some of you, being the highest court in said State in which a decision could be had in the said suit between A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downs and associates, as plaintiffs, and Edward H. Pardee and Collis P. Huntington, defendants, and Andrew Dow and Geo. W. Heyer, their sureties, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision was in favor of such their validity, or wherein title, right privilege, or immunity was claimed under the Constitution or a treat- or statute of or commission held or authority exercised under, the United States, and the decision was against the title,
287 right, privilege, or immunity specially set up and claimed under such Constitution, treat-, statute, commission or authority, a manifest error hath happened, to the great damage of said Edward H. Pardee and to Arabella D. Huntington, executrix, and Chas. H. Tweed and Isaac E. Gates, executors, of the last will and testament of said Collis P. Huntington, deceased, and to said Andrew Dow and Geo. W. Heyer as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 21st day of June, in the year of our Lord one thousand nine hundred and one.

J. H. FINKS,
Clerk Circuit Court, Northern District of Texas,
[L. S.] By CHAS. H. LEDNUM, *Deputy.*

Allowed:
ANSON RAINEY,
Chief Justice of the Court of Civil Appeals in and for the 5th Supreme Judicial District of Texas.

Filed in court of civil appeals, Jun- 21, 1901.
GEO. W. BLAIR, *Clerk.*

Assignment of Errors.

Filed in Court of Civil Appeals June 21st, 1901.

In the Court of Civil Appeals, 5th Supreme Judicial District of Texas.

EDWARD H. PARDEE ET AL.
vs.
A. D. ALDRIDGE ET AL. } No. 2865.

Now comes plaintiffs in error in the above numbered and entitled cause, Edward H. Pardee and Arabella D. Huntington, Chas. H. Tweed and Isaac E. Gates, as executrix and executors, of Collis P. Huntington, deceased, and Andrew Dow and Geo. W. Heyer, and on writ of error from the Supreme Court of the United States say that in the record and proceedings in said cause, there is manifest error, which they assign as follows:

First.

The court of civil appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error number ten, reading as follows: "The court erred in refusing special charge No. 8, requested by defendants, as follows: 'You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered on the 31st day of January, 1883, foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company, as trus-
288 tee, and ordering the sale of the property embraced in said mortgage, and the subsequent decree of said court in said cause, rendered on June 6th, 1883, which decrees have been introduced in evidence before you, and the sales made under and in pursuance of said decrees, embraced the property sued for in this cause, and were effectual to vest title to the same in those under whom defendants claim, and you are therefore instructed to return a verdict in favor of the defendants.'"

Second.

The court of civil appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error numbered eleven reading as follows: "The court erred in refusing special charge No. 9, requested by defendants, as follows: 'You are instructed that the decree of foreclosure and sale rendered by the circuit court of the United States in and for the northern district of Texas, at Dallas in cause No. 193, upon its equity docket, foreclosing the mortgage previously executed by the Texas Trunk Railroad Company to the Central Trust Company of New York, as trustee, and ordering sale of the property covered by said mortgage, and the sale made under and in pursuance of said decree to defendant, Edward H. Pardee, embraced the property involved in this suit, and was effectual to vest the title to said property in said Edward H. Pardee, and you are therefore instructed to return a verdict in favor of the defendants.'"

Third.

The court of civil appeals erred in overruling and refusing to sustain plaintiffs in error's original assignment of error numbered twenty-two, reading as follows: "The court erred in refusing the twelfth special charge requested by defendants, which special charge is as follows: 'You are instructed that the decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 275 upon the equity docket, in favor of Geo. T. Atkins, as receiver, etc., and against C. T. Campbell *et al.*, rendered on July 16th, 1895, which, with the original bill of complaint in said cause, has been introduced in evidence before you, was effectual to establish and bring into the custody of said court, through George T. Atkins, as receiver, in equity cause No. 193, upon the docket of said court, the two tracts of land described in plaintiffs' first amended original petition in this case; that is to say, the twenty-five-acre tract described by metes and bounds in subdivision (*b*), and the 11.92-acre tract described by metes and bounds
289 in subdivision (*d*) of paragraph III of plaintiffs' first amended original petition in this cause, and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land.'"

Fourth.

The court of civil appeals erred in deciding against the validity of a commission held and authority exercised under the United States, drawn in question in said cause.

Fifth.

The court of civil appeals erred in deciding against the titles, rights, privileges and immunities specially set up and claimed by said Edward H. Pardee and Collis P. Huntington, under the Constitution and statutes of, and commission held, and authority exercised under the United States.

Sixth.

Said court of civil appeals erred in affirming the judgment of the district court in so far as it was against said Pardee and Huntington, and reversing said judgment in so far as it was in their favor, and in rendering judgment against them for the land and premises involved in said suit, and in not rendering judgment therefor in their favor.

Wherefore said plaintiffs in error each pray that the judgment of said court of civil appeals be reversed and said cause remanded, and for such further proceedings as law and justice may require.

W. J. J. SMITH,
JAS. A. BAKER,
R. S. LOVETT,

Attorneys for Edward H. Pardee and for Arabella D. Huntington, Executrix, and Chas. H. Tweed and Isaac E. Gates, Executors, of the Last Will and Testament of Collis P. Huntington, Deceased, and for Andrew Dow and Geo. W. Heyer, Plaintiffs in Error.

Filed in court of civil appeals Jun- 21, 1901.

GEO. W. BLAIR, *Clerk.*

290 *Bill of Costs Accrued in Court of Civil Appeals.*

Costs accrued in court of civil appeals, 5th district,

Filing record	$ .50
Docketing cause	.50
Entering appearances	1.00
Filing briefs	2.00
Filing and entering motion	.35
Entering orders	2.50
Filing extra papers	1.20
Copy of judgment, etc	1.50
Entering continuance	.20
Entering judgment	1.00
Taxing cost and copy	.50
Issuing mandate	1.50
Recording opinion	10.00
Certified copy of bill of costs	1.00
Issuing notices	3.00
Express charges paid	1.10
Making this transcript	125.00
	$152.85

Recapitulation.

Costs accrued in district court, Dallas Co	$155.45
Costs accrued in supreme court	7.00
Costs accrued in court civil appeals	152.85
Total	$315.30

291 *Certificate of Clerk of Court of Civil Appeals.*

THE STATE OF TEXAS:

I, Geo. W. Blair, clerk of the court of civil appeals in and for the fifth supreme judicial district of the State of Texas, do hereby certify that the foregoing oages numbered from 1 to 290, inclusive, contain a correct copy of the transcript from the district court of Dallas county, Texas, and true copies of orders made, opinion, judgment and costs accrued in said court of civil appeals, and orders made by the supreme court of the State of Texas and costs accrued therein, and writ of error bond, duplicate writ of error, and assignment of errors to the Supreme Court of the United States, in the case of A. D. Aldridge *et al. vs.* E. H. Pardee *et al.* as the same appear of record and on file in my office.

Given under my hand and seal of office, at Dallas, Texas, this 3rd day of July, A. D. 1901.

[Seal Court of Civil Appeals of the State of Texas.]

GEO. W. BLAIR,
Clerk Court Civil Appeals, 5th Supreme Judicial District of Texas.

292 In the Court of Civil Appeals, 5th Supreme Judicial District of Texas.

EDWARD H. PARDEE ET AL.
vs.
A. D. ALDRIDGE ET AL. } No. 2865.

To any justice of the Supreme Court of the United States or the chief justice of the court of civil appeals in and for the 5th supreme judicial district of Texas:

Petitioners Edward H. Pardee and Arabella D. Huntington, Chas. H. Tweed and Isaac E. Gates, as executrix and executors of the last will and testament of Collis P. Huntington, deceased, and Andrew Dow and Geo. W. Heyer, respectfully represent that on or about the 21st day of May, 1898, A. D. Aldridge, A. F. Hardie and W. G. Mowry (whose full Christian names are to petitioners unknown), as trustees for J. E. Downs and associates, commenced a suit in the district court of Dallas county, Texas, in and for the 44th judicial district, against petitioner Edward H. Pardee and Collis P. Huntington, for the recovery of certain lands and premises situated in the counties of Dallas, Kaufman and Houston, in the States of Texas, particularly described in plaintiffs' petition in said suit; and afterward in response to process served upon them, said Pardee and Huntington appeared and interposed among others the defenses hereinafter mentioned to said action, and upon trial of said cause in due course judgment was rendered by said district court in favor of the plaintiffs for a portion of the lands sued for, and in favor of the defendants for the rest. From the judgment so rendered by

said district court both parties appealed to the court of civil appeals in and for the 5th supreme judicial district of Texas, where the said cause upon appeal of both parties was numbered and entitled as above; and afterward on, to wit, the 30th day of June, 1900, said court of civil appeals rendered judgment whereby it affirmed the judgment of said district court in so far as the same was against said
293 Pardee and Huntington, and reversed the same in so far as it was in their favor, and rendered judgment in favor of said Aldridge, Hardie and Mowry, as such trustees, and against said Pardee and Huntington, for all the lands involved in said suit, and against Andrew Dow and Geo. W. Heyer as sureties upon the bond executed by the said Pardee and Huntington to perfect their appeal to said court of civil appeals. Afterward and in due time, said Pardee and Huntington filed in said court of civil appeals their motion for rehearing in said cause, which was thereafter, to wit, on the 13th day of October, 1900, by said court overruled and denied. Thereafter, and in due time, said Pardee and Huntington applied in due form and as authorized by law, to the supreme court of the State of Texas for a writ of error in said cause, to said court of civil appeals upon the grounds among others hereinafter mentioned, which application was thereafter, to wit, on the 24th day of January, 1901, by said supreme court denied, and the writ of error so prayed for was refused; whereupon, the said judgment of the said court of civil appeals, which is the highest court of the State of Texas in which a decision in said suit could be had, became and is now final. Petitioners further say that said Collis P. Huntington died on or about the 13th day of August, 1900, leaving a will and testament whereby petitioners Arabella D. Huntington, Chas. H. Tweed and Isaac E. Gates were named and appointed his executrix and executors; that said will has been admitted to probate in the office of the surrogate of the county and State of New York, and letters testamentary have been duly issued to the said Arabella D. Huntington, Chas. H. Tweed and Isaac E. Gates as such executrix and executors, and a true copy of such letters duly authenticated is filed herewith marked "Exhibit A" and made a part hereof.

Petitioners say that they are aggrieved by the said judgment of the court of civil appeals, and the proceedings in said suit, and that in the said judgment and proceedings had prior thereunto in said cause, errors were committed to the prejudice of petitioners, because they say there was in said suit drawn in question the validity of a statute and an authority exercised under the United States, and the decision in said suit was against their validity, and there was drawn in question the validity of a statute, or constitution, of, or an authority exercised under a State on the ground of their being
294 repugnant to the Constitution, or laws of the United States, and the decision in said suit was in favor of their validity, and that titles, rights, privileges and immunities were in said suit claimed by petitioners under the Constitution and statutes of and commissions held, and authority exercised under, the United States and the decision in said suit was against the titles, rights, privileges and immunities specially set up and claimed therein by petitioners

under such Constitution, statutes, commissions and authority, as will hereinafter more fully appear.

Petitioners say that upon trial of said cause in said district court said Edward H. Pardee and Collis P. Huntington the defendants therein, introduced in evidence a decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered on the 31st day of January, 1883, foreclosing a mortgage executed by the Texas Trunk Railroad Company, under whom plaintiffs in said suit claimed, to the International Trust Company, as trustee, and ordering the sale of the property embraced in said mortgage; and also introduced other decrees and proceedings of said circuit court of the United States and its officers, showing sale of said mortgaged property pursuant to said foreclosure decree and specially set up and claimed at the time, that said decree and proceedings of said circuit court of the United States embraced the property involved in this suit, and were effectual to vest title to the same in those under whom said defendants claimed; and in due time and form requested the court to so instruct the jury, which request was by said district court refused, when said Pardee and Huntington duly excepted, and upon their appeal to said court of civil appeals, duly assigned such ruling of said district court as error, as shown by their assignment of error originally numbered 10; but said court of civil appeals overruled and refused to sustain said assignment of error, and affirmed such action of said district court.

Petitioners further say that upon the trial of said cause in said district court, said Edward H. Pardee and Collis P. Huntington, the defendants therein, introduced in evidence a decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, rendered in cause No. 193 upon its equity docket, foreclosing a mortgage executed by the Texas Trunk Railroad Company, under whom the plaintiffs in said suit claimed, to the
295 Central Trust Company of New York, as trustee and ordering the sale of the property embraced in said mortgage; and also introduced other decrees and proceedings of said circuit court of the United States and its officers, showing the sale of said mortgaged property pursuant to said foreclosure decree, and specially set up and claimed at the time, that said decree and proceedings of said circuit court of the United States embraced the property involved in this suit, and were effectual to vest title to the same in those under whom said defendants claimed; and in due time and form requested the court to so instruct the jury, which request was by said district court refused, when said Pardee and Huntington duly excepted, and upon their appeal to said court of civil appeals, assigned such ruling of said district court as error, as shown by their assignment of error originally numbered 11; but said court of civil appeals overruled and refused to sustain said assignment of error, and affirmed such action of said district court.

Petitioners further say that upon the trial of said cause in said district court, there was introduced in evidence a decree of the circuit court of the United States in and for the northern district of Texas, at Dallas, in cause No. 275 upon its equity docket, in favor

of Geo. T. Atkins, as receiver, and against C. T. Campbell and others, rendered on the 16th day of July, 1895, with the original bill of complaint in said cause, whereby it was in effect decreed specifically that a portion of the lands and premises involved in this suit was in the custody of said circuit court through Geo. T. Atkins its receiver in said cause No. 275; and thereupon said Pardee and Huntington specially set up and claimed that said decree was effectual to establish and bring into the custody of said circuit court through said Geo. T. Atkins its receiver, the lands and premises particularly described in said decree; and in due time and form, requested said district court to so instruct the jury, and direct them to return a verdict in favor of said defendants for the lands and premises so embraced in said decree, which request was by said court denied, to which ruling said Pardee and Huntington duly excepted and upon their appeal to said court of civil appeals, they duly assigned said ruling as error, as shown by their assignment of error originally numbered 22; but said court of civil appeals overruled and refused to sustain said assignment of error, and affirmed such action of said district court.

296 Petitioners further say that each of the rulings above mentioned and complained of with others, were duly assigned as error in, and were urged as grounds for, the application made as aforesaid by said Pardee and Huntington to the supreme court of Texas for a writ of error in said cause to said court of civil appeals, but the same with said application for writ of error, were overruled and denied by said supreme court.

Petitioners refer to the record of said cause, as filed in said court of civil appeals, for further and more complete statement of the rulings and proceedings complained of, and the facts upon which they specially set up and claimed the benefit of the decrees aforesaid of said circuit court of the United States, and of the proceedings thereunder and for the manner in which such claims were set up and made. And petitioners say that in the proceedings above mentioned in said cause they specially set up and claimed titles, rights, privileges and immunities under the Constitution and statutes of, and commission held, and authorities exercised under, the United States, and the decision of said district court and of said court of civil appeals and of the supreme court of Texas, were against the titles, rights, privileges and immunities specially set up and claimed by petitioners Pardee and the said Collis P. Huntington in said cause.

Petitioners refer to the assignment of errors filed herewith and pray that the same may be considered for the purposes of this application as a part hereof, and further pray that a writ of error may be allowed and issued herein to the said court of civil appeals, in and for the 5th supreme judicial district of Texas, which now has the record in said cause for the removal of said cause into the Supreme Court of the United States, to the end that the error in said judgment and the proceedings in said cause may be duly corrected and full and speedy justice done to the parties aforesaid in this behalf,

and that the transcript of the record, proceedings and papers in said cause duly authenticated may be sent to the said Supreme Court.

W. J. J. SMITH,
JAS. A. BAKER,
R. S. LOVETT,

Attorneys for Edward H. Pardee and for Arabella D. Huntington, Chas. H. Tweed, and Isaac E. Gates, Executrix & Executors of Collis P. Huntington, Dec'd, and Andrew Dow & Geo. W. Heyer, Petitioners.

297 Allowed this 21 day of June, 1900.

ANSON RAINEY,
Chief Justice of the Court of Civil Appeals in and for the 5th Supreme Judicial District of Texas.

298 EXHIBIT A.

Form 60.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, Greeting:

Know ye, that we having examined the records and files in the office of the surrogate of the county of New York, do find there remaining, a certain record of letters testamentary granted to Arabella D. Huntington Charles H. Tweed and Isaac E. Gates, upon the goods, chattels and credits of Collis P. Huntington, deceased, in the words and figures following to wit:

Form 1.

The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or whom they may concern, send greeting:

Know ye, that at the county of New York, on the 12th day of October in the year of our Lord one thousand nine hundred *and* before Hon. Abner C. Thomas a surrogate of our said county, the last will and testament of Collis P. Huntington deceased, was proved, and is now approved and allowed by us; and the said deceased having been at the time of his death a resident of the county of New York, by means whereof the proving and registering said will and the granting administration of all and singular the goods, chattels and credits of the said testator and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased and any way concerning his will, is granted unto Arabella D. Huntington Charles H. Tweed and Isaac E. Gates each of the county and State of New York, the executors in the said will named, they being first duly sworn, well, faithfully and honestly to discharge the duties of such executors.

In testimony whereof, we have caused the seal of office of the surrogates' court of the county of New York to be hereunto affixed.

Witness, Hon. Abner C. Thomas, a surrogate of our said county of New York at said county, the 15th day of October in the year of our Lord one thousand nine hundred.

Seal New York Surrogates' Court.

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogates' Court.

299 The attention of executors and administrators is directed to the following provisions of the statutes:

Revised Statutes, part 2, chap. 6, title 3, art. 1, 3 R. S. (7th ed.), p. 2294.

§ 2. The executors and administrators of any testator or intestate, within a reasonable time after qualifying, and after giving the notice in the next section required, with the aid of appraisers so appointed by the surrogate, shall make a true and perfect inventory of all the goods, chattels and credits of such testator or intestate, and where the same shall be in different and distant places, two or more such inventories, as may be necessary.

§ 3. A notice of such appraisement shall be served, five days previous thereto, on the legatees and next of kin, residing in the county where such property shall be; and it shall also be posted in three of the most public places of the town. In every such notice, the time and place at which such appraisement will be made shall be specified.

§ 4. Before proceeding to the execution of their duty, the appraisers shall take and subscribe an oath, to be inserted in the inventory made by them, before any officer authorized to administer oaths, that they will truly, honestly and impartially appraise the personal property, which shall be exhibited to them, according to the best of their knowledge and ability.

§ 5. The appraisers shall, in the presence of such of the next of kin, legatees, or creditors of the testator or intestate as shall attend, proceed to estimate and appraise the property which shall be exhibited to them; and shall set down each article separately, with the value thereof in dollars and cents, distinctly in figures, opposite to the articles respectively.

§ 6. The following property shall be deemed assets, and shall go to the executors or administrators, to be applied and distributed as part of the personal estate of their testator or intestate, and shall be included in the inventory thereof:

1. Leases for years; lands held by the deceased from year to year; and estates held by him for the life of another person.

2. The interest which may remain in the deceased at the time of his death in a term for years, after the expiration of any estate for years therein, granted by him or any other person.

3. The interest in lands devised to an executor for a term of years, for the payment of debts.

4. Things annexed to the freehold, or to any building, for the purpose of trade or manufacture, and not fixed to the wall of a house, so as to be essential to its support.

5. The crops growing on the land of the deceased, at the time of his death.

6. Every kind of produce raised annually by labor and cultivation, except grass growing and fruit not gathered.

7. Rent reserved to the deceased which had accrued at the time of his death.

8. Debts secured by mortgages, bonds, notes or bills; accounts, money and bank bills, or other circulating medium, things in action, and stock in any company, whether incorporated or not.

9. Goods, wares, merchandise, utensils, furniture, cattle, provisions, and every other species of personal property and effects, not hereinafter excepted.

§ 7. Things annexed to the freehold, or to any building, shall not go to the executor, but shall descend with the freehold to the heirs or devisees, except such fixtures as are mentioned in the fourth subdivision of the last section.

§ 8. The right of an heir to any property not enumerated in the preceding sixth section, which by the common law would descend to him, shall not be impaired by the general terms of that section.

§ 9. Where a man having a family shall die, leaving a widow or a minor child or children, the following articles shall not be deemed assets, but shall be included and stated in the inventory of the estate, without being appraised:

1. All spinning wheels, weaving looms, one knitting machine, one sewing machine, and stoves put up or kept for use by his family.

2. The family Bible, family pictures, and school books used by or in the family of such deceased person, and books not exceeding in value fifty dollars, which were kept and used as part of the family library before the decease of such person.

3. All sheep to the number of ten, with their fleeces and the yarn and cloth manufactured from the same, one cow, two swine, and the pork of such swine, and necessary food for such swine, sheep or cow for sixty days, and all necessary provisions and fuel for such widow or child or children for sixty days after the death of such deceased person.

4. All necessary wearing apparel, beds, bedsteads and bedding, necessary cooking utensils, the clothing of the family, the clothes of the widow and her ornaments proper for her station; one table, six chairs, twelve knives and forks, twelve plates, twelve teacups and saucers, one sugar dish, one milk pot, one teapot and twelve spoons, and also other household furniture which shall not exceed one hundred and fifty dollars in value.

300 § 10. The said articles shall remain in the possession of the widow, if there be one, during the time she shall live with, and provide for, such minor child or children. When she shall cease so to do, she shall be allowed to retain as her own, her wearing apparel, her ornaments and one bed, bedstead and the bedding for the same; and the other articles so exempted shall then belong to

such minor child or children. If there be a widow, and no such minor child, then the said articles shall belong to such widow.

§ 11. The inventory shall contain a particular statement of all bonds, mortgages, notes and other securities for the payment of money, belonging to the deceased, which are known to such executor or administrator; specifying the name of the debtor in each security; the date; the sum originally payable; the indorsements thereon, if any, with their dates, and the sum which, in the judgment of the appraisers, may be collectible on each security.

§ 12. The inventory shall also contain an account of all moneys, whether in specie or bank bills, or other circulating medium, belonging to the deceased, which shall have come to the hands of the executor or administrator; and if none shall come to his hands, the fact shall be so stated in such inventory.

§ 13. The naming of any person executor in a will, shall not operate as a discharge, or bequest, of any just claim, which the testator had against such executor, but such claim shall be included among the credits and effects of the deceased in the inventory, and such executor shall be liable for the same, as for so much money in his hands, at the time such debt or demand becomes due; and he shall apply and distribute the same in the payment of debts and legacies, and among the next of kin, as part of the personal estate of the deceased.

§ 14. The discharge or bequest in a will of any debt or demand of the testator, against any executor named in his will, or against any other person, shall not be valid as against the creditors of the deceased; but shall be construed only as a specific bequest of such debt or demand; and the amount thereof shall be included in the inventory of the credits and effects of the deceased, and shall, if necessary, be applied in the payment of his debts; and, if not necessary for that purpose, shall be paid in the same manner and proportion as other specific legacies.

§ 15. Upon the completion of the inventory, duplicates thereof shall be made and signed by the appraisers; one of which shall be retained by the executor or administrator, and the other shall be returned to the surrogate within three months from the date of such letters.

§ 16. Upon returning such inventory, the executor or administrator shall take and subscribe an oath before the surrogate; or if such surrogate be absent from the county, or incapable, from sickness or otherwise, of transacting business, or his office be vacant, then before a judge of the county courts of such county, stating that such inventory is in all respects just and true; that it contains a true statement of all the personal property of the deceased, which has come to the knowledge of such executor or administrator, and particularly of all money, bank bills, and other circulating medium, belonging to the deceased, and of all just claims of the deceased against such executor or administrator, according to the best of his knowledge. Such oaths shall be endorsed upon, or annexed to the inventory.

§ 23. Any one or more of the executors or administrators named

in any letters, on the neglect of the others, may return an inventory; and those so neglecting shall not thereafter interfere with the administration, or have any power over the personal estate of the deceased; but the executor or administrator so returning an inventory shall have the whole administration until the delinquent return and verify an inventory, agreeable to the provisions of this article.

§ 24. Whenever personal property, or assets of any kind, not mentioned in any inventory that shall have been made, shall come to the possession or knowledge of an executor or administrator, he shall cause the same to be appraised in manner aforesaid, and an inventory thereof to be returned, within two months after the discovery thereof; and the making of such inventory and return may be enforced in the same manner as in the case of the first inventory.

Laws of 1842, chap. 157, § 2 (3 R. S., 7th ed.), p. 2297.

Exemption for a Widow and Minor Children, $150.—§ 2. When a man having a family shall die, leaving a widow or minor child or children, there shall be inventoried by the appraisers, and set apart for the use of such widow, or for the use of such widow and child or children, or for the use of such child or children, in the manner now prescribed by the ninth section of title third, chapter sixth of part second of the Revised Statutes, necessary household furniture, provisions or other personal property, in the discretion of said appraisers, to the value of not exceeding one hundred and fifty dollars, in addition to the articles of personal property now exempt from appraisal by said section.

Laws of 1867, chap. 782 (3 R. S., 7th ed.), p. 2297.

Children of Deceased Widow.—§ 13. When a widow shall die, leaving her surviving a minor child or children, the same articles and personal property shall be set apart by the appraisers for the benefit of such minor or minors, as is now provided by law in the case of a man dying and leaving a widow or minor children; and all articles and property set apart, in accordance with law, for the benefit of a widow and a minor or minors, shall be and remain the sole personal property of such widow after such minor or minors shall have arrived at age.

Code of Civil Procedure.

§ 2565. *Fees of Appraiser.*—An appraiser is entitled, in addition to his actual expenses, to a sum to be fixed by the surrogate, not exceeding five dollars for each day actually and necessarily occupied by him in making the appraisal or inventory. The number of days' services and the expenses, if any, must be proved by the affidavit of the appraiser, and the sums payable therefor taxed by the surrogate and paid by the executor or administrator.

301 Form 59.

All which we have caused by these presents to be exemplified, and the seal of our said surrogates' court to be hereunto affixed.

Witness, Hon. Abner C. Thomas, a surrogate of the county of New York, at the city of New York, the twenty-seventh day of May in the year of our Lord one thousand nine hundred and one — of our Independence the one hundred and twenty-fifth.

[Seal New York Surrogates' Court.]

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogates' Court.

I, Abner C. Thomas, a surrogate of said county, and presiding magistrate of the surrogates' court, do hereby certify that J. Fairfax McLaughlin, whose name is subscribed to the preceding exemplification, is the clerk of said surrogates' court of the county of New York, and that full faith and credit are due to his official acts. I further certify that the seal affixed to the exemplification is the seal of our said surrogates' court, and that the attestation thereof is in due form, and according to the form of attestation used in this State.

Dated, New York, May 27th, 1901.

ABNER C. THOMAS, *Surrogate.*

{Ten-cent United States postage stamp, canceled May 28, '01. J. F. McL.}

STATE OF NEW YORK, *County of New York,* } *ss:*

I, J. Fairfax McLaughlin, clerk of the surrogates' court of the county of New York, do hereby certify that Hon. Abner C. Thomas, whose name is subscribed to the preceding certificate, is the presiding magistrate of the surrogates' court of the county of New York, duly elected, sworn and qualified, and that the signature of said magistrate to said certificate is genuine.

In testimony whereof, I have hereto set my hand and affixed the seal of the said court, this 27" day of May 1901.

[Seal New York Surrogates' Court.]

J. FAIRFAX McLAUGHLIN,
Clerk of the Surrogates' Court.

{Ten-cent United States postage stamp, canceled May 28, '01. J. F. McL.}

302 [Endorsed:] Letters testamentary granted to A. D. Huntington C. H. Tweed and I. E. Gates upon the goods, chattels and credits of Collis P. Huntington, deceased.

303 [Endorsed:] No. 2865. Edward H. Pardee *et al. vs.* A. D. Aldridge *et al.* Petition for writ of error to United States Supreme Court. Filed in court of civil appeals, Jun- 21, 1901. Geo. W. Blair, clerk.

304 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the court of civil appeals in and for the 5th supreme judicial district of Texas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of civil appeals in and for the 5th supreme judicial district of Texas, before you or some of you, being the highest court of said State in which a decision could be had in the said suit between A. D. Aldridge, A. F. Hardie and W. G. Mowry, trustees for J. E. Downs and associates, as plaintiffs, and Edward H. Pardee and Collis P. Huntington, defendants, and Andrew Dow and Geo. W. Heyer, their sureties, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaty or laws of the United States, and the decision was in favor of such their validity, or wherein a title, right, privilege, or immunity was claimed under the Constitution or a treaty or statute of, or commission held or authority exercised under, the United States, and the decision was against the title, right, privilege or immunity specially set up and claimed under such Constitution, treaty, statute, commission or authority, a manifest error hath happened, to the great damage of said Edward H. Pardee and to Arabella D. Huntington, executrix, and Chas. H. Tweed and Isaac E. Gates, executors, of the last will and testament of said Collis P. Huntington, deceased, and to said Andrew Dow and Geo. W. Heyer, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same in
305 the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of June, in the year of our Lord one thousand nine hundred and one.

[The Seal of the U. S. Circuit Court, Northern Dist. Texas, Dallas.]

J. H. FINKS,
Clerk Circuit Court, Northern District of Texas,
By CHAS. H. LEDNUM, *Deputy.*

Allowed.

ANSON RAINEY,
Chief Justice of the Court of Civil Appeals in and for the 5th Supreme Judicial District of Texas.

306 [Endorsed:] No. 2865. Edward H. Pardee *at al. vs.* A. D. Aldridge *et al.* Original writ of error. Filed in court of civil appeals Jun- 21, 1901. Geo. W. Blair, clerk.

307 UNITED STATES OF AMERICA, *ss:*

To A. D. Aldridge, A. F. Hardie, and W. G. Mowry, trustees for J. E. Downs and associates, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of civil appeals in and for the 5th supreme judicial district of Texas, wherein Edward H. Pardee and Arabella D. Huntington, executrix, and Chas. H. Tweed, and Isaac E. Gates, executors, of the last will and testament of Collis P. Huntington, deceased, and Andrew Dow and Geo. W. Heyer are plaintiffs in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against said plaintiffs in error as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 21st day of June, in the year of our Lord one thousand nine hundred and one.

ANSON RAINEY,
Chief Justice of the Court of Civil Appeals in and for the 5th Supreme Judicial District of Texas.

We hereby accept service of above and foregoing citation in error and waive further service thereof and further waive insertion of Christian names of defend*and*ants in error. This 21st day of June 1901.

DICKSON & MORONEY,
MORONEY & LOVE,
ALEXANDER, CLARK & THOMPSON,
Attorneys for Defendants in Error.

308 [Endorsed:] No. 2865. Edward H. Pardee, *et al. vs.* A. D. Aldridge, *et al.* Citation on error. Filed in court of civil appeals, Jun- 21 1901 Geo. W. Blair, clerk.

Endorsed on cover: File No. 18,229. Texas court of civil appeals, 5th supreme judicial district. Term No. 137. Edward H. Pardee, and Arabella D. Huntington, executrix & Charles H. Tweed & Isaac E. Gates executors of Collis P. Huntington deceased *et al.* plaintiffs in error *vs.* A. D. Aldridge, A. F. Hardie and W. G. Mowry trustees for J. E. Downs and associates. Filed July 17", 1901.

FILE COPY.

JAN 3 1903

JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 137.

EDWARD H. PARDEE, ET AL.,
Plaintiffs in Error,

vs.

A. D. ALDRIDGE, ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

R. S. LOVETT,
MAXWELL EVARTS,
Counsel for Plaintiffs in Error.

S. G. Simmons, 74 Nassau and Cedar streets, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 137.

EDWARD H. PARDEE, ET AL.,

vs.

A. D. ALDRIDGE, ET AL.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This is an action of trespass to try title instituted in one of the District Courts of Dallas county, Texas, by A. D. Aldridge, A. F. Hardie and W. G. Mowry purporting to be trustees for "J. E. Downes and associates," against Edward H. Pardee and Collis P. Huntington to recover a

twenty-five acre tract of land situated in the City of Dallas and commonly referred to as the "Hughes and Slaughter tract"; a tract of 11.92 acres near the City of Dallas commonly referred to as the "Mayes tract"; certain unused lots and blocks in the villages of Kemp and Crandall; and several different tracts of unimproved land situated in the counties of Dallas, Kaufman and Houston, all of which had previously belonged to the Texas Trunk Railroad Company, through which both parties claim (R. 1–7).

The several tracts of unimproved land were situated remotely from the railroad of said company; and none of said tracts nor any of the lots and blocks in Kemp and Crandall had been used or were so situated as to be capable of use in the maintenance or operation of the railroad, but the same had been given to the company, as originally organized, by different individuals to aid or encourage the construction of the railroad, and not for occupation or use for railroad purposes. The only property involved in this suit that was acquired or used by said company in the construction or operation of its railroad was the Hughes and Slaughter tract and the Mayes tract.

The Hughes and Slaughter tract of twenty-five acres is situated in what was at the time of its purchase in 1880 the town of East Dallas, but what is now the City of Dallas. On account of the growth of the city and the improvement of the property around it, it has since increased enormously in value and is now probably worth at least Fifty Thousand Dollars. It is the only property in the City of Dallas, the terminus of the line, that was ever owned by the Texas Trunk Railroad Company. Soon after its incorporation the company purchased the tract for terminal purposes, projected its line from it, constructed its main track across it; and it has ever since been held and used for such purposes, as far as the condition of the company permitted. The Mayes tract contained a sand bank and other material adapted to the construction and ballasting of the line, and has ever since been used as the supply for material required in ballasting the track. The controversy in this court is over the "Hughes and Slaughter tract" and the "Mayes tract" only.

The Texas Trunk Railroad Company was agreed upon as the common source of title (R. 75) —plaintiff in error claiming through certain

foreclosure proceedings in the Circuit Court of the United States for the Northern District of Texas against said railroad company, and defendants in error claiming through certain execution sales against the railroad company and through transfers made by some of its directors.

Most of the facts were agreed upon in writing by the parties (R. 75–124), and such evidence as was adduced was without conflict.

Claim of Plaintiffs in Error.

The Texas Trunk Railroad Company was incorporated under the general laws of Texas November 6th, 1879, for the purpose of constructing and operating a line of railway from the City of Dallas to the Gulf of Mexico at or near Sabine Pass, with a branch line to the Sabine River,—the length of the proposed line in all being about 350 miles (R. 76–78). Promptly upon its organization the company proceeded with the construction of its line, and by the latter part of 1881 had extended it from the City of Dallas and put it in operation for a distance of about forty miles, and had other portions under construction. On March 22nd, 1880, the railroad company executed to the International

Trust Company of Boston, as trustee, a mortgage in the usual form to secure a series of bonds to be issued from time to time against its line as different sections thereof should be completed (R. 79–80). A considerable number of such bonds, aggregating a large amount, were issued, negotiated and sold by the company.

In December, 1881, the railroad company became involved in financial difficulties. It defaulted in the payment of interest upon its bonds and numerous suits, mostly for small amounts due for labor performed and material furnished in the construction of the line, were commenced against the company in the courts of Dallas and Kaufman counties. In one of such suits a receiver of all the property and assets of the company was appointed by the District Court of Kaufman county on December 5th, 1881 (R. 81). Subsequently the holders of certain bonds of the company secured by the mortgage to the International Trust Company intervened in that suit and procured its removal into the Circuit Court of the United States for the Northern District of Texas, at Dallas, when the International Trust Company appeared and by leave of that court became the complainant in the suit and as such

it filed a bill for the foreclosure of the mortgage given to it to secure the bonds of the railroad company (R. 81–82). After the removal of the suit into the Federal Court the Receiver of the District Court of Kaufman County resigned and the Federal Court appointed another Receiver in the cause.

On January 31st, 1883, the foreclosure proceeding came on for final hearing in the Circuit Court, when a decree was rendered foreclosing the mortgage of March 22nd, 1880, executed by the railroad company to the International Trust Company and directing the sale of the property covered thereby (R. 82–83). The sale was made pursuant to the decree on May 1st, 1883, and the property was bought by M. F. Dickson and associates, as purchasing trustees; and the sale was in due time confirmed by the court (R. 83). The decree of confirmation, however, required the purchasers to pay into the court, when ordered so to do, such amounts as should be found necessary to satisfy certain costs and claims remaining to be determined, and provided that in case of failure to pay such amounts after certain notice the clerk of the court should issue to the marshal an order to re-sell the property.

In the meantime, however, upon confirmation of the sale, the property was conveyed to the purchasers and they were let into possession, but subject to the conditions of the decree of confirmation. Thereupon Dickson and associates, as such purchasers, reorganized under the original charter of the railroad company as authorized by a provision of the statutes of Texas which now appears as Article 4549, R. S., 1895, and reads as follows:

> "In case of the sale of the entire roadbed, track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust or any other power, the purchaser or purchasers at such sale and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company; and

shall have power to construct, complete, equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws." (*H. & T. C. R. Co. vs. Shirley, 54 Texas, 125; Acres vs. Moyne, 59 Texas, 623.*)

The reorganized company promptly entered into a contract for the completion of the line to Cedar—a point upwards of fifty miles from Dallas—and the road was put in operation to that point in November, 1883. The Company failed, however, to pay the obligations executed for the work, whereupon on May 18th, 1885, the holders of such obligations recovered judgment against it in the Dallas County District Court, for about One Hundred and Fifty Thousand Dollars. The company also failed to pay certain costs and claims established by the Federal Court in the foreclosure proceeding when ordered so to do by that court, as a result of which the clerk of that court issued to the marshal orders directing the re-sale of the property as provided by the court in the decree confirming the sale. Execution was also issued out of the State Court upon the judgment against the reorganized company for

the amount due under the construction contract just mentioned. The sheriff levied the execution upon the railroad and its appurtenances and upon all the land in controversy and sold the same on July 7th, 1885, at public auction to J. E. Schneider, W. J. Keller and J. E. Henderson. The marshal levied the orders of sale issued to him out of the Federal Court upon the same property, and on October 6th, 1885, sold it at public auction to the same parties who had previously purchased at the sheriff's sale (R. 86–88). The Hughes and Slaughter tract and the Mayes tract were particularly described by metes and bounds in the levy made by the sheriff, and in his deed to Schneider and associates (R. 86); and it was evident that the purpose was to levy the execution upon and sell everything to which the Texas Trunk Railroad Company as originally organized or as then existing had any claim of title. The marshal, however, in his levy did not particularly describe the lands, but seized and sold "the entire railroad, roadbed, depots, depot grounds, offices, shops, and all other property of every description thereunto belonging," etc. (R. 88).

J. E. Schneider and his associates, who purchased the property at such sales by the sheriff

and marshal, thereupon reorganized the company again under its original charter as authorized by Article 4549 of the Revised Statutes above quoted; and the company, as thus organized, continued to own the property until finally dissolved as hereinafter stated. The railroad company, as thus for the second time reorganized, on August 30th, 1888, executed to the Central Trust Company of New York, as trustee, a mortgage in the usual form to secure an issue of bonds aggregating the principal sum of One Million Dollars (R. 89–90).

But the ill fortune of the enterprise continued and the title to the property was clouded by litigation. Prior to the foreclosure of the mortgage to the International Trust Company and the sale thereunder in 1883, a large number of judgments, but for small amounts as a rule, had been rendered against the company in the courts of Dallas County in suits commenced before or about the time of the appointment of the first receiver in December, 1881 (R. 106–108). Upon some of such judgments executions were quietly issued and levied upon the railroad with its appurtenances (including the Hughes and Slaughter tract and the Mayes tract by specific description)

and sale thereof pursuant to such levy was made October 7th, 1886, and the property was bought by E. M. Powell and associates (R. 109–111), who thereafter asserted title and from time to time brought suits for its recovery and thus harried the company with litigation without ever bringing any of such suits to trial. Most of those familiar with the title considered such suits without merit because the execution sales through which Powell and associates claimed were made long subsequent to the foreclosure of the International Trust Company mortgage and the sale thereunder which had vested the title in the reorganized company. But by such means the company was discredited and was unable to secure the funds necessary to complete the line or to properly maintain and operate that portion which had been constructed.

The property being involved in litigation and the company being without means to properly maintain and repair it, or, at any rate, failing to do so, had got into such a condition and the track became worn and run down to such an extent that the road could not be safely operated and the company could not adequately perform its public duties as a carrier. Upon these grounds the

Attorney General of Texas, on September 25th, 1889, presented in the Dallas County District Court an information in the nature of *quo warranto* praying the forfeiture of the charter of the company and for the appointment of a receiver to operate its line. A receiver was promptly appointed to operate the property pending final hearing, but upon change of the venue of the cause to the Ellis County District Court, the latter court, in November, 1889, held that a receiver should not have been appointed in such a proceeding before final hearing, and thereupon discharged the receiver and returned the property to the company (R. 91).

The railroad company made default in paying the interest due upon the bonds secured by the mortgage of August 30th, 1888, executed by it to the Central Trust Company, as trustee; and on September 4th, 1891, the Trust Company commenced proceedings in the Circuit Court of the United States for the Northern District of Texas for the foreclosure of the mortgage; and on the same day a receiver was appointed by that court to take possession of and operate the property pending the foreclosure (R. 94-95). A few days later, *i. e.* September 14th, 1891, the *quo warranto*

proceeding came on for final hearing in the Ellis County District Court, when a decree was rendered forfeiting the charter of the company and appointing John H. Gaston as receiver to wind up its affairs, and with power and authority to sue and be sued and to take all such legal proceedings as should be deemed necessary to get possession of the property and assets of the company (R. 92–93).

The dissolution by said decree of the railroad company being ground for abating the foreclosure proceeding of the Central Trust Company (*National Bank vs. Colby, 21 Wall., 609; Life Association vs. Goode, 71 Texas, 90*) that company proceeded in due time to file in its foreclosure proceeding in the Federal Court a Bill of Revivor against Gaston, as receiver of the dissolved Railroad Company under appointment of the Ellis county District Court; and the suit was revived against him as the legal representative of the dissolved corporation under the Texas statutes (R. 97, 98). Such foreclosure proceeding came on for final hearing in the Federal Court on February 26th, 1895, when a decree was rendered foreclosing the mortgage executed by the railroad company on August 30th, 1888,

to the Central Trust Company and directing the sale of the mortgaged property (R. 98, 158–165). The property was sold pursuant to the decree on August 27th, 1895, when it was purchased by plaintiff in error, Edward H. Pardee, for himself and his co-plaintiff Collis P. Huntington; and the sale thus made was duly confirmed (R. 98). Pursuant to decree entered March 16th, 1896 (R. 99), Pardee satisfied the balance of his bid, and on April 9th, 1896, the property was duly conveyed to him by deed executed by the Special Master Commissioner appointed to make the sale; by John H. Gaston, as receiver of the Ellis county District Court, the representative of the dissolved mortgagor; and by George T. Atkins, the receiver of the Federal Court in the foreclosure proceeding, who was directed by the decree of foreclosure to join in the deed and convey any property standing in his name or to which he had in any manner acquired title (R. 100–103).

The enterprise having been wrecked by past contentions respecting the title of the property, it seemed best for every legitimate interest that the title should be cleared, if possible, and that this should be accomplished before the sale of the property in the pending foreclosure proceed-

ings in order that its value might not be depreciated on account of the conflicting claims. E. M. Powell and associates, who had purchased in 1886 at the sale made under the old judgments in the state courts (R. 106–111), were the only persons openly asserting title adverse to the reorganized railroad company and the holders of its bonds. In order to cancel and remove such claims as a cloud upon the title and to clear up the title George T. Atkins, the receiver of the Federal Court, in the suit for the foreclosure of the Central Trust Company mortgage, by leave of Court, on January 13th, 1894, filed a bill in that Court against E. M. Powell and associates, all of whom were named as defendants, which suit was styled "George T. Atkins, Receiver, etc., vs. C. T. Campbell, et al," and was numbered 275 upon the equity docket (R. 111–112). The property specifically involved was the line of railroad and the Hughes and Slaughter tract and the Mayes tract. The case was hotly contested, the main contention of the defendants being, as the contention of the defendants in error in this case is, that the mortgage to the International Trust Company and the decree foreclosing the same in 1883 did

not embrace the Hughes and Slaughter tract or the Mayes tract. Much evidence upon this question and others was taken, and upon final hearing a decree was rendered on July 16th, 1895, sustaining the contention of the receiver, and canceling the claim of Powell and associates as a cloud upon the title of the receiver and those represented by him—*the court thereby adjudicating that the Hughes and Slaughter tract and the Mayes tract were covered by the original mortgage and decree of foreclosure in 1883 whereby the title of the railroad company had been divested prior to the execution sales against it through which defendants claim* (R. 112–113). As already indicated, George T. Atkins, the receiver in said cause, in obedience to the requirement of the decree of foreclosure, joined the Master Commissioner and specifically conveyed to Pardee all the rights established or arising under the decree in favor of said receiver in said suit of George T. Atkins, Receiver, etc., vs. C. T. Campbell, et al. (R. 100–103).

Afterward E. M. Powell and associates released or conveyed to plaintiff in error, Pardee, all claim to or interest in the property in controversy (R. 113-114).

Claim of Defendants in Error.

A number of debts, generally for small amounts due by the Texas Trunk Railroad Company, were left unsatisfied upon the sale of its railroad and other property under the foreclosure of the mortgage to the International Trust Company in 1883. Most of them were reduced to judgment in the county and district courts of Dallas county in suits commenced prior to the foreclosure. Many years after the foreclosure sale and the several reorganizations of the company and when most of the judgments were dormant and the other claims barred by limitation a number of such claims got into the hands of Messrs. Dickson & Moroney, a firm of attorneys at Dallas, for collection. They controlled claims against the reorganized company which executed the mortgage to the Central Trust Company, as well as against the original company that executed the mortgage to the International Trust Company. In view of this conflict said attorneys advised their clients to pool their interests in the venture, which said attorneys were to undertake, with trustees to be selected to act as plaintiffs in this suit (R. 135–138).

Among the claims against the company as

originally existing was one involved in a suit filed November 4th, 1881, by W. F. Thompson vs. Texas Trunk Railroad Company in the Dallas county District Court in which there was a judgment rendered March 15th, 1887, (R. 114–116). Such judgment was one of the claims that came into the hands of Dickson & Moroney. On March 9th, 1895, some eight years after the judgment was rendered, said attorneys caused an execution to be issued thereon and at the same time levied upon the Hughes and Slaughter tract, the Mayes tract and other lands in Dallas county, and the same was sold under such levy on April 2nd, 1895, for $2,350 to C. C. Bumpas, "trustee for I. E. Downes and associates." Another execution was issued on the judgment August 30th, 1895, and levied upon the land in Houston county, which, on September 6th, was sold to C. C. Bumpas, as such trustee, for $150 (R. 116). Bumpas was a stenographer in the office of Dickson & Moroney.

Bumpas thereupon commenced an action of trespass to try title for the recovery of said lands against the surviving members of the Board of Directors of the original Texas Trunk Railroad Company in office at the time of the foreclosure

sale against that company in 1883; and John H. Gaston, receiver of the Ellis County District Court, was also made a party defendant. Neither the receiver of the Federal Court in the foreclosure proceeding, who was in possession of the property, nor plaintiffs in error were made parties to such suit, nor had they any notice whatever of any such proceeding, or of plaintiff's claim until this suit was commenced. Such board of directors consisted of nine members, but all except four were dead,—those living being John F. Ely, James B. Simpson, D. A. Robinson and W. L. Cabell (R. 121). A provision of the statutes of Texas in force at the time, and now appearing as Article 4555 Revised Statutes 1895, reads as follows:

> "Whenever a sale of the roadbed, track, franchise and chartered powers and privileges is made as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority), the directors or managers of the sold out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold out company, and

shall have full powers to settle the affairs of the sold out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and other necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands."

No defense whatever was made to the suit thus brought against them by Bumpas by the surviving directors, and it was obviously collusive. Simpson, one of the directors, testified that he acted as attorney for the defendants in the case and made no defense (R. 134–135). He was, moreover, one of the creditors in whose interest the suit was being prosecuted. W. L. Cabell, another of the defendant directors, was also a creditor similarly interested with the plaintiff (R. 130–132). So was the defendant Robinson (R. 136). It does not appear that the remaining defendant director, Ely, was interested in the

Bumpas suit against him. Gaston, receiver, filed an answer, but his attorneys did not attend upon the trial but made an agreement with plaintiff as to certain facts (R. 137).

Of course the suit under such circumstances resulted in a judgment in favor of Bumpas, as trustee (R. 116–118). Subsequently Simpson, Ely, Robinson and Cabell, the four surviving directors, purporting to act as trustees of the Texas Trunk Railroad Company (all of whom except Ely, and probably Ely also, were among the creditors represented by Bumpas, as trustee). executed a deed conveying the property in quession to Bumpas, as such trustee (R. 120). Bumpas afterwards relinquished his trusteeship by conveying the property to the defendants in error, Aldridge, Hardie and Mowry (R. 121–122), who, according to the allegations of their petition, have brought and are prosecuting this suit "under the direction of Dickson & Moroney, who, as attorneys for J. E. Downes and associates, are authorized to direct said trustees in the recovery, by suit or otherwise, of any of said property," (R. 1–2).

It appears, therefore, that defendants in error claim under the Texas Trunk Railroad Company, as originally existing, through an execution sale against it many years after the foreclosure sale in the Federal Court in 1883, and the consequent dissolution of the railroad company, and under deeds made by four out of a board of nine directors, three of whom at least were personally interested in the scheme in furtherance of which the deed was executed.

Plaintiffs in error contested in the state courts the title to the property involving other than the Hughes and Slaughter tract and the Mayes tract because of the apparent insufficiency of plaintiffs' *prima facie* title, rather than upon the strength of their own title, since, as already indicated, none of the property except the Hughes & Slaughter tract and the Mayes tract was ever used, or was capable of use, in connection with the operation of the railroad, and had not been acquired for any such purpose, but had been donated to the company to encourage the construction of its road.

But the Hughes and Slaughter tract and the Mayes tract had been bought by the company

for railroad purposes, had been ever afterward used by it for railroad purposes and were absolutely necessary for such railroad purposes. They passed with the railroad into the possession of the purchasers at the sale made upon the foreclosure of the mortgage to the International Trust Company in 1883, and had always followed the possession of the railroad through the different organizations and receiverships subsequently and had been used in connection therewith. They had been in the possession of the receivers of the Federal Court in both of the foreclosure proceedings in that court, and such receivers had regularly assessed and paid the taxes thereon with the other railroad property in their hands. Plaintiffs in error specially set up the proceedings of the Federal Court in the foreclosure suits and the decrees therein and claimed that the effect thereof was to vest the title to said property in them and those through whom they claimed.

Of course if the property was embraced in the decrees foreclosing the mortgages of the Texas Trunk Railroad Company, defendants in error have no title, since such decrees necessarily cut off the railroad company through and under

which they claim; and defendants in error can have no greater right than the railroad company could have. Manifestly, if the Texas Trunk Railroad Company, as it originally existed, could not have recovered this property of the reorganized company, or of plaintiffs in error, then defendants in error cannot do so. The question, therefore, in this court is whether the foreclosure decrees embrace the two tracts in controversy.

After introducing upon the trial the decrees (R. 152–165) and other proceedings of the Federal Court in the foreclosure suits (R. 82–84, 98–99) plaintiffs in error specially requested the court in several different forms to instruct the jury that such proceedings and decrees were effectual to vest the plaintiffs in error, or those under whom they claim with title to the property in question, and that a verdict should be returned accordingly, but such charges were refused (R. 34–36), and the action of the court was duly assigned as error—a specific exception to the ruling in such case being unnecessary under the provisions of Article 1320, R. S. 1895, providing that,

"When the instructions asked, or some

> of them, are refused * * * such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exception thereto."

They also requested the court, by special charge No. 12 (R. 36–37), to instruct the jury that the decree of the Federal Court in the suit of Atkins, as receiver of said court, against C. T. Campbell et al., was effectual to establish and bring into the custody of said court through said receiver in the foreclosure suit the two tracts of land in question, but such charge was also refused.

The Judgment.

The court instructed the jury peremptorily to return a verdict in favor of plaintiffs for all the property sued for except the Hughes & Slaughter tract and the Mayes tract (R. 17–19). As to those two tracts, although there was no conflict in the evidence, the court submitted special issues, but in view of the undisputed facts instructed the jury peremptorily what their finding should be on all the material points, but leaving them free, however, to make findings upon various

special issues submitted at the request of counsel for defendants in error (R. 19–23). Upon the return of the verdict both parties moved for judgment (R. 39–40) and upon the uncontroverted facts the court held as matter of law that plaintiffs in error were entitled to the Hughes and Slaughter tract and the Mayes tract and accordingly rendered judgment in their favor for those two tracts and in favor of defendant in error for all the other land sued for (R. 40–53).

Both parties appealed to the Court of Civil Appeals (R. 174–196), by which court so much of the judgment as was in favor of defendants in error was affirmed, and so much thereof as awarded the Hughes and Slaughter tract and the Mayes tract to plaintiffs in error was reversed and judgment therefor was rendered in favor of defendants in error (R. 210–211). Plaintiffs in error moved for a rehearing, which was overruled (R. 227), and then applied to the Supreme Court of Texas for a writ of error, which was denied (R. 227). Collis P. Huntington died after judgment in the District Court, and Arabella D. Huntington, Charles H. Tweed and Isaac E. Gates, as executrix and executors of his last will and testament, joined plaintiff in error, Edward H.

Pardee, in applying for a writ of error from this court to the Court of Civil Appeals, which was duly allowed by the Chief Justice of that court.

Assignment of Errors.

The Court of Civil Appeals erred:

FIRST. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company did not embrace the so-called "Hughes & Slaughter" tract of land, and in thereby denying due effect to said decrees.

SECOND. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company did not embrace the so-called "Mayes" tract of land, and in thereby denying due effect to said decrees.

THIRD. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the Central Trust Company did not embrace the so-called "Hughes and Slaughter" tract of land, and in thereby denying due effect to said decrees.

FOURTH. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the Central Trust Company did not embrace the so-called "Mayes" tract of land, and in thereby giving due effect to said decrees.

FIFTH. In not deciding that the decree of the Circuit Court of the United States for the Northern District of Texas, rendered July 16, 1895, in cause No. 275 upon its Equity Docket in favor of George T. Atkins, as Receiver, etc., against C. T. Campbell, *et al.*, was effectual to establish and bring into the custody of said court, through said Atkins, as Receiver in cause No. 193 upon its Equity Docket, the "Hughes and Slaughter" tract and the "Mayes" tract, and that the sales through which defendants in error claim were void because made while said property was so in legal custody.

SIXTH. In reversing the judgment of the District Court in so far as it was in favor of said Pardee and Huntington and in rendering judgment against them for said two tracts of land and in not rendering judgment in their favor therefor.

ARGUMENT.

FIRST POINT.

Plaintiffs in error having specially set up the decrees of the Circuit Court of the United States in the foreclosure proceedings as a defense to the action, and the evidence upon the issue being without conflict, this court has jurisdiction and power to determine whether due effect was denied to such decrees by the decision of the State Court that they did not embrace the property in controversy.

We have seen that plaintiffs in error introduced the decrees and other proceedings of the Circuit Court of the United States in the suits for the foreclosure of the mortgage of the Texas Trunk Railroad Company, as it originally existed, to the International Trust Company, and the mortgage of said railroad company, as reorganized, to the Central Trust Company and specially claimed, when offering said evidence, that said proceedings and decrees were effectual to divest said railroad company of the title to the property in controversy and to vest the same in plaintiffs in error and those through whom they claim (R. 150–165); and that they also specially re-

quested the court to so instruct the jury, and that such requests were refused (R. 34–37). While the District Court, when it came to enter judgment, held with plaintiffs in error upon this point and ruled that said decrees did embrace the Hughes & Slaughter tract and the Mayes tract (R. 166–173), yet the Court of Civil Appeals reversed such judgment and held directly to the contrary (R. 199). It is entirely clear, therefore, that this court has jurisdiction to inquire and determine whether by such judgment of the Court of Civil Appeals due effect has been denied to the decrees of the Circuit Court in the foreclosure proceedings, *Dupasseur vs. Rochereau*, *21 Wall.*, *130*, *134*; *Embry vs. Palmer*, *107 U. S.*, *3*; *Crescent Live Stock Co. vs. Butchers Union*, *120 U. S.*, *141*, *146*; *Central National Bank vs. Stevens*, *169 U. S.*, *432*, *460*.

The case was tried very largely upon a written agreement between counsel (R. 75–124). It covered every material fact in the case but one, viz.: Whether the mortgages of the Texas Trunk Railroad Company and the decrees of the Federal Court foreclosing them embraced the property in controversy. The mortgage and decrees did not by metes and bounds, or otherwise,

specifically describe the property. The description of the property covered by the decree of January 31st, 1883, foreclosing the mortgage to the International Trust Company, so far as material here, is as follows (R. 153):

> "All and singular the *railroad* as the same now is, or may be hereafter * * * constructed, * * * including the *right-of-way*, *roadbed*, superstructure, * * * all *lands* and *depot grounds*, station-houses and depots, * * * and *property purchased*, and *to be purchased*, for the construction and equipment of said road; all the locomotives and cars, and machinery, and all kinds of rolling stock, whether then owned or thereafter to be purchased, * * * and all the franchises and the *rights* of the said railroad company, together with all machine shops, tools, implements, and including *all appendages and appurtenances* of said railroad, and the *property* of said railroad company then acquired, or which might be thereafter acquired in the State of Texas used for and pertaining to the operation of said railroad."

The description in the decree foreclosing the mortgage to the Central Trust Company was substantially the same (R. 159–160).

Whether, therefore, the mortgages and decrees embraced the property in controversy depended necessarily upon the relative situation of the railroad and the land; and this must be the case in every instance where the application of mortgages purporting to cover "after acquired" property and decrees foreclosing them are brought in question. It was necessary to adduce evidence showing this relation; and the testimony was confined to this point,—all other facts being covered by the written agreement of counsel.

Of course there was no room for dispute among the witnesses respecting the relative location or position of the railroad and the land. There was no contention that any of the property was occupied, or was capable of occupation or use, in the operation or maintenance of the railroad except the Hughes and Slaughter tract and the Mayes tract. The oral testimony, therefore, related to those tracts. The only evidence outside of the agreement of counsel and copies of the proceedings of the Federal Court in the foreclosure suit was the testimony of W. M. Johnson, W. L. Cabell, James B. Simpson, W. J. Moroney, W. H. Gaston and William Whyte. Johnson was

a surveyor employed by defendants in error and the person who prepared the maps of the Hughes and Slaughter tract and of the Mayes tract which will be found in the record, pages 124–125.

Cabell, it will be remembered, was one of the surviving directors of the railroad company, as well as a creditor interested in the scheme of defendants in error. He was one of the promoters of the railroad company and testified that he acted for it in the purchase of the two tracts in controversy. He was obviously friendly to the defendants in error, with whom his interests lay; but, nevertheless, testified in connection with many immaterial statements that the two tracts in question were bought for railroad purposes and that the company intended to use them for such purposes, but that if any portion should not be required for such purposes the same would be sold to employes (R. 131). None was ever so sold, however, and the testimony of other witnesses showed that every foot of land was necessary. Simpson was also one of the surviving directors of the railroad company who was also interested with the defendants in error. There is nothing else material in his testimony (R. 134–135).

Moroney was a member of the law firm of Dickson & Moroney, and his testimony related to their connection with this litigation; and is in nowise material to the present issue (R. 135–138).

Gaston, the first witness in behalf of plaintiffs in error, owned property adjoining the Hughes and Slaughter tract and resided in that locality, and testified to the purchase of said tract by the railroad company for terminal purposes, etc. (R. 138–140).

Whyte became superintendent of the railroad upon the appointment of the receiver in the foreclosure proceedings in September, 1891, and continued in that position until 1896, when he became receiver in the same litigation. His testimony showed the extent to which the two tracts in question had been used for railroad purposes and the necessity therefor, etc. (R. 140–147).

The testimony of these witnesses will be stated in detail and will be further discussed hereafter under another point of this argument. We mention it in this connection merely to show as briefly as possible that said witnesses testified respecting different aspects of the situation and in nowise contradictorily.

The Judge of the District Court perceived no

controversy as to the facts and was of opinion as a matter of law that none of the property, except the Hughes and Slaughter tract and the Mayes tract, was covered by the mortgages and decrees of foreclosure, but that as to those two tracts they were embraced by such decrees, and therefore passed to plaintiffs in error. See his opinion, R. 166–173. He should have, therefore, peremptorily instructed the jury to return a verdict accordingly, which was demanded by the plaintiffs in error; but counsel for defendants in error persuaded him to submit special issues to the jury. Nevertheless, because of the absence of conflict in the evidence, he instructed the jury (R. 17–19) peremptorily what their finding should be on all the material issues, which was practically the same as directing a verdict for plaintiffs in error for the Hughes and Slaughter tract and the Mayes tract, and in favor of the defendants in error for the rest of the land, and upon consideration of the motions of the parties after the verdict (R. 40) judgment to that effect was rendered (R. 40–53).

Counsel for defendants in error, however, succeeded in persuading the Judge to also submit to the jury a list of special issues prepared by them

which involved only minor contentions without effect on the general question as to the rights of the parties, and practically none of which were called for by the evidence (R. 19–23). We shall undertake later on to demonstrate absolutely that the answers returned to such questions were against the uncontroverted evidence. The District Judge properly regarded the questions as irrelevant and the answers as against the evidence and therefore ignored them and rendered judgment in accordance with the answers returned to the questions prepared and submitted by the Judge himself, and which were demanded by the uncontroverted evidence (R. 17–19). His only mistake was in yielding to the importunities of counsel to submit a series of questions which were manifestly irrelevant in view of the evidence and in not peremptorily instructing the jury to return a verdict in favor of plaintiffs in error for the Hughes and Slaughter tract and the Mayes tract, and in favor of the defendants in error for the rest of the land.

The Court of Civil Appeals failed to find or point out any conflict in the evidence. While that court reversed the judgment of the District Court, it did so only because it took a different

view of the *legal effect* of the evidence from that entertained by the District Judge; and consequently held as matter of law that the tracts of of land in controversy were not embraced in the mortgages executed by the railroad company and the decrees foreclosing the same (R. 199–209).

It is to be borne in mind throughout that the Court of Civil Appeals knew from the record before it that the Circuit Court of the United States had three times adjudged that the two tracts in question had passed out of the Texas Trunk Railroad Company by the foreclosure of the International Trust Company mortgage—once by appointing a receiver to take possession of the property in the suit for the foreclosure of that mortgage and turning it over through such receiver to the purchasers at the foreclosure sale; again by taking possession of it through its receiver in the suit for the foreclosure of the mortgage of the Central Trust Company and in turning the property over to the plaintiffs in error through such receiver upon completion of their purchase under the foreclosure sale in that case; and again by the explicit adjudication in the suit of Atkins, Receiver, vs. Campbell, et al. (R. 111–114).

It will be strange indeed if this court is found to be without power to prevent the Court of Civil Appeals from thus deliberately, if not maliciously, overthrowing decrees regularly rendered by the Circuit Court of the United States.

Now we maintain that since the evidence is wholly without conflict this court has the right to examine it and determine whether, as we contend, the Court of Civil Appeals denied due effect to the decrees of the Circuit Court of the United States under which the plaintiffs in error claim. All the evidence is brought up in the record by what, in the Texas practice, is designated a "Statement of Facts." Article 1379, Revised Statutes Texas, 1895, reads as follows:

> "After the trial of any cause, either party may make out a written statement of the facts given in evidence on the trial, and submit the same to the opposite party, or his attorney, for inspection. If the parties, or their attorneys, agree upon such statement of facts, they shall sign the same, and it shall then be submitted to the judge, who shall, if he finds it correct, approve and sign it, and the same shall be filed with the clerk." etc.

The statement thus filed becomes a part of the record on appeal or writ of error and is required to embrace all the evidence except where the parties agree that the evidence is sufficient to establish a given fact, in which event it is sufficient to state such fact without the evidence establishing it.

We are perfectly well aware that the provisions of the Seventh Amendment of the Constitution of the United States declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law applies in cases of writs of error from this court to state courts (*The Justices vs. Murray, 9 Wall., 274*), and also that a writ of error, unlike an appeal, brings up for review questions of law only (*Wiscart vs. Douchy, 3 Dallas, 321*). But where, as in this case, the evidence is without conflict, and the question is, whether the judgment of the state court upon such evidence denies due effect to a decree of a court of the United States, the question is obviously one of law and not of fact, and this court has the right of review. (*Martin vs. Hunter's Lessee, 1 Wheaton, 304; Smith vs. State of Maryland, 6 Cr., 286; Chouteau vs.*

Eckhart, 3 How., 344; Cunningham vs. Ashley, 14 How., 377; Hyde vs. Booraem, 16 Peters, 169, 176; The Francis Wright, 105 U. S., 381; Republican River Bridge Co., vs. Kansas Pac. R. Co., 29 U. S., 315; Lytle vs. Arkansas, 22 How., 193; Mackay vs. Dillon, 4 How., 421, 447; United States vs. Pugh, 99 U. S., 265, 269; The Belgenland, 114 U. S., 355, 372; Sun Mutual Ins. Co. vs. Ocean Ins. Co., 107 U. S., 485, 501–503; The Edwin I. Morrison, 153 U. S., 199.)

The question in controversy in the case of *Martin vs. Hunter's Lessee*, 1 Wheaton, 304, was the title to a certain tract of land, and the case was brought to this court upon the ground that the construction of a treaty by the Court of Appeals of Virginia was involved. It was urged before this Court that it could not inquire into the title, but could simply examine into the correctness of the construction put upon the treaty by the state court, and that the judgment of the said court was not re-examinable here, unless it appeared on the face of the record that some construction was put upon the treaty. This view of the law was not sustained by the court which said at pages 357, 358, of its opinion, as follows:

"If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? *From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and,*

therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires, that the error upon which the appellate court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court."

In *Smith vs. State of Maryland*, 6 Cr., 286, which was brought to this court by writ of error to the Court of Appeals of the State of Maryland, the complainants claimed the land in dispute un-

der the State as owners of the equitable fee, alleging that it had passed to them under the confiscation acts of the State. The defendant insisted that the title of his *cestui que* trust had not been divested at the date of the treaty of peace, and was protected by that treaty. This court held that it was proper for it to consider and construe the confiscation acts of the State prior to determining the federal question of whether the treaty had been properly construed or not. In other words, the court examined the case upon its merits. At page 305, it was said as follows:

> "The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the 6th article of that treaty; and, in order to arrive at a correct result in the decision of that point, it became necessary, in the state court, and will be necessary in this, to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made, or not? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty; and it is perfectly immaterial to the point of jurisdiction, that the

first part of the way is the most difficult to explore. Although the defendant's counsel admit, and the Supreme Court of the State may, in this particular case, have decided, that, where the confiscation is not complete before the treaty, the estate attempted to be confiscated is protected by the treaty, still, if, according to the true construction of the State laws, this court should be of opinion that the acts of confiscation left something to be done necessary to the perfection of the title claimed under them, which was not done at the time the treaty was made, we must say that, in this case, the construction of the treaty was drawn in question, and that the decision of the state court was against the right set up, under the treaty, by one of the parties.

"This leads to the consideration of the merits of the cause, which depend upon the question before stated, namely, whether the confiscation of the lands in question was so far complete by the laws referred to, that the title and estate of Ann Ottey was devested out of her and vested in the State, prior to the treaty of peace? This must depend upon the true construction of the acts passed in the year 1780, chapters 45 and 49, as it is not pretended that any proceedings were in-

stituted in the nature of an office, to complete the forfeiture of these lands, upon the grounds of alienage or otherwise."

In *Cunningham vs. Ashley*, 14 How., 377, which was brought to this court by writ of error to the Supreme Court of Arkansas, the defendants claimed the legal title to the land in controversy, while the complainant claimed that he had a paramount equitable title thereto. The court examined all the facts in the case with relation to their bearing upon the title of the parties, and at page 389 said:

> "*The facts in the case are exceedingly voluminous and complicated, but we have considered them, and the legal and equitable bearing they have upon the title of the parties.* Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued, were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void. The decree of the supreme court of Arkansas is therefore reversed, and the cause is remanded to that court, with instructions to enter a decree in pursuance of this opinion."

Hyde vs. Booraem was an action for the possession of certain notes which had been executed and deposited for delivery to the plaintiffs under certain conditions. The proceedings in the court below were in accordance with the practice of Louisiana, where the suit originated, and upon writ of error from this court all the evidence was sent up with the record. After pointing out that this court was without authority to review, upon writ of error, rulings upon questions of fact and that embarrassment attended the examination of the cause on account of the manner in which the proceedings occurred in the court below, and that the same embarrassment had been encountered previously in a case from Louisiana, the court, through Justice STORY, observed (16 Peters, 176):

> "Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is, whether, in

point of law, upon these facts, the judgment can be maintained."

The court then proceeded to review the facts and concluded that the judgment of the court below was wrong, and therefore reversed it.

"*The Francis Wright*" (105 U. S., 381–387) came to this court under the act of February 16th, 1875, which limited the appellate jurisdiction of this court in admiralty causes to questions of law. It was a suit in admiralty upon a charter party in which the libellant sought to recover for the unseaworthiness of the vessel. The Court below had found that the loss (to a shipment of fresh beef) was caused by insufficient refrigerating apparatus and refused to include a finding that there was a leakage in the tubes and stoppage for repairs, and that the engineer had not been supplied with sufficient tools for making repairs. This court held that these were all incidental matters occupying the position of evidence rather than that of the facts to which the law was to be applied; and that they did not constitute the whole of the evidence from which the fact as to seaworthiness or not was to be determined, and that consequently they were not proper matters for review by this court, "unless,"

as the court added, "it also appears that the determination of the ultimate fact to be ascertained depended alone upon the legal effect as evidence of the facts stated." The intimation clearly is that if the ultimate fact did depend entirely upon the effect of the facts stated in the bill of exceptions this court would review them.

Republican River Bridge Co. vs. Kansas Pacific R. Co., 92 U. S., 315, came before this court on writ of error to the Supreme Court of Kansas. The contest was over a tract of land, both parties claiming under grants from Congress. The findings of fact by the trial court were held to be conclusive upon the Supreme Court, but Justice MILLER used this language:

> "In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact so far as may be necessary to determine the validity of the right set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common law action, this court has the same inability to review those facts in a case

coming from a State court that it has in a case coming from a circuit court of the United States."

The Court of Civil Appeals is authorized by the Constitution of Texas, Section 6, Article V., to pass upon questions of fact and its decision thereon is final—the jurisdiction of the Supreme Court being limited to questions of law arising upon the facts found by the Court of Civil Appeals.

Mackay vs. Dillon, 4 Howard, 421-447, was brought to this court on writ of error to the Supreme Court of Missouri. The action was ejectment to recover a tract of land, and the questions presented were upon the competency and legal effect of certain testimony consisting of copies of instruments and surveys of record. This court, through Justice CATRON, said (4 Howard, 447):

> "The powers of the supreme court are limited in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, &c., or where their construc-

tion is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of congress, &c., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgment reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction,—and on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant."

The case was reversed on the ground that the state court gave an erroneous charge upon the effect of the testimony adduced.

United States vs. Pugh, 99 U. S., 265, was an action brought in the Court of Claims to recover the value of sugar alleged to have been seized by United States soldiers and turned over to the Military Commission and sold and the proceeds paid into the treasury under the Abandoned and Captured Property act of 1864. This court considered the practice in appeals from the Court of Claims under the rule which required a "finding" by that court of "the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them." The Court of Claims sent up special findings of circumstantial facts showing that the property had been seized and turned over to the commission; that the commission while the property was in its possession was ordered to sell all the property in its possession not claimed or released and not required for the army, and turn over the proceeds to the chief quartermaster; that the commission sold the property for the net sum of $4,362.23; that the chief quartermaster received money at various times during the year from sales of sugar and molasses (the kind of property seized) to the amount of $33,796.23. *There was no specific finding that the $4,362.23 were paid*

over to him. The court, speaking by Chief Justice WAITE, said:

> "The ultimate fact to be determined in this case is whether the proceeds of the sale of the captured property belonging to the claimant have been paid into the treasury. No direct proof to that effect has been given, but if shown at all, it is by way of inference from certain circumstantial facts which have been established by the evidence. These circumstantial facts are set forth in the finding which has been sent here as the finding upon which alone the judgment was rendered, and as the case stands, the question we are to decide is whether those facts are sufficient to support the judgment. Confessedly, the court has found all the facts which have been directly established by the evidence. * * * If what has been found is, in the absence of anything to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the treasury, the judgment is right. Otherwise it is wrong. * * * The question of practice to be settled is whether, under our rule, the judgment of the court of claims *as to the legal effect* of what may, perhaps not improperly, be called the *ultimate circum-*

stantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal. * * *

To avoid misapprehension in the future, we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record."

It is important to note that the Court of Claims did not find the ultimate fact, which was, whether the proceeds of the sale of the captured property belonging to the claimant had been paid into the treasury. Its findings recited the circumstances but failed to include such ultimate fact, but this court, from the circumstances thus appearing in the record, deduced and found the ultimate fact essential in the decision of the case.

The Edwin I. Morrison, *153 U. S.*, *199*, *215*, was a libel begun in the district court for damages to a cargo alleging that the vessel was not at the beginning of the voyage tight, staunch and strong and in every way fitted for said voy-

age as required. The district court found for libellant and entered a decree accordingly. The Circuit Court reversed the decree of the district court and dismissed the libel. On appeal to the Supreme Court, the decree of the Circuit Court was reversed and the decree of the District Court was affirmed. Mr. Chief-Justice FULLER said:

> "The findings that 'at the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage;' that 'there was no latent defect in the vessel which contributed to the injury to the cargo;' and that 'the whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter-party and bills of lading,' were findings determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such open to our revision."

In Dower vs. Richards, 151 U. S., 658, Justice GRAY, in an opinion reviewing many of the cases, observed (page 667):

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

And in this connection he quotes the language of Justice CATRON in *Mackay vs. Dillon*, above set forth.

It may be interesting in this connection to observe that the Supreme Court of Texas, the jurisdiction of which by express constitutional provision is limited to questions of law, does not hesitate to review judgments of the Courts of Civil Appeals (which are declared by the constitution to be conclusive upon the facts) in cases where it deems the evidence insufficient to support the judgment; and in some cases it bases its judgment upon facts not embraced in the findings of the Court of Civil Appeals, but which are contained in the statement of facts. (*Clarendon Land Co. vs. McClelland, 86 Texas, 179, 187; Bauman vs. Jaffray, 86 Texas, 617; G. H. & W. Ry. Co. vs. Lacey, 86 Texas, 246; Tackaberry vs. City National Bank, 85 Texas,*

488, 496; McLeary vs. Dawson, 87 Texas, 524, 536; Ætna Ins. Co. vs. Holcomb, 89 Texas, 404; Lee vs. I. & G. N. R. Co., 89 Texas, 583, 588; Kilgore vs. N. W. T. B. Association, 90 Texas, 139; Moore vs. Waco Building Association, 92 Texas, 265.

In *Clarendon Land Co. vs. McClelland* it was said (86 Texas, 187):

> "It is also true that the fifth section of the same act provides, among other things, that 'the judgment of the Court of Civil Appeals shall be conclusive upon the facts of the case,' but the meaning of the provision is clear. To recite the uncontroverted facts of a case demands no act of judgment in the sense in which that term is used in the statute. What is meant is that the decision of that tribunal upon questions of fact—that is to say, a question upon which there may be a conflict in the evidence—shall be final and not the subject of review in this court." * * *
>
> "We think the purpose was to empower this court not to revise the decision of the Court of Appeals upon any disputed question of fact, but to enable it to decide all issues presented for the determination of this court in the light of the pleadings, and

of every fact established either by the undisputed evidence or the conclusions of the appellate court upon the conflicting evidence."

In *McLeary vs. Dawson* it was decided that the findings of fact by the Court of Civil Appeals may be supplemented by the undisputed evidence upon questions omitted in such findings; and that both the findings and the undisputed testimony will be considered by the Supreme Court on writ of error (86 Texas, 524).

See also *Fellows vs. Northrup, 39 N. Y., 117; Whitman vs. Winchester, etc., Co., 55 Conn., 247; Morey vs. Milliken* (*Me.*), *30 Atlantic Rep., 102.*

Here we have a case in which a state court has overthrown the decrees of a Circuit Court of the United States in two distinct proceedings for the foreclosure of mortgages attended with possession of the property; and has deprived the purchasers at the foreclosure sales of an important part of the property bought by and delivered to them under such decrees. All the facts upon which this extraordinary judgment of the state court is based are brought up in a statement of facts in accordance with the state practice and are in the record before this court and are without conflict

or controversy. We respectfully submit that, under such circumstances, it is plainly the right and the duty of this court to examine the case just as it was examined upon this question in the Court of Civil Appeals, and to vindicate the decrees of the Circuit Court which the uncontroverted evidence shows have been denied due effect by the judgment of the Court of Civil Appeals.

SECOND POINT.

The uncontroverted evidence shows that the Hughes and Slaughter tract and the Mayes tract were covered by the foreclosure decrees of the Circuit Court; and by holding otherwise the Court of Civil Appeals denied said decrees due effect.

The Texas Trunk Railroad Company was incorporated November 6th, 1879, to build a line of railroad from the City of Dallas to the Gulf, at Sabine Pass, a distance of about three hundred miles. Dallas was the domicile of the company, and was the beginning point of its line. One would suppose that some ground would be required at that place for stations and terminal facilities. This seemed to be the view at that

time of the promoters of the enterprise (including plaintiff's chief witness and coadjutor, Cabell), as it appears that they proceeded almost immediately—as the deed is dated March 13th, 1880—to procure the Hughes and Slaughter tract, which, all agreed, was peculiarly suited to the purposes of the company.

The Texas & Pacific Railroad passes through the City of Dallas from east to west. The Texas Trunk Railroad was projected to run from said city in a southeasterly direction. The Hughes and Slaughter tract is 650 x 1680 feet, and it is sometimes designated as "Block 828." It lies practically at right angles with and about 400 feet south of the Texas & Pacific track in the eastern portion of the city. The map of the tract prepared by the witness W. M. Johnson, under the employment of defendants in error, is found in the record at page 124, but the witness is not clear as to when the data with reference to the improvements, etc., thereon was collected by him. Certainly it does not show all the railroad improvements that had been upon the property, since only a portion of the Y, at one time extending across the tract, is shown. It does show, however, the main track of the Texas Trunk

Railroad extending the entire length of the tract and near its southwesterly boundary.

It is clear that the construction of the Texas Trunk was commenced at a point upon the Hughes and Slaughter tract, or at the connection with the Texas & Pacific about five hundred feet northwesterly, and was projected thence southeasterly toward the ultimate destination of Sabine Pass. It was the beginning point of the line—the headquarters of the enterprise. It was the only land that the company acquired, or has ever owned in the City of Dallas. The only other land any where in the vicinity that the company ever owned is the Mayes tract, which is about three miles distant from the present corporate limits of the city, and consequently more than that distance from the Hughes and Slaughter tract, which is now in the city.

Aside from the existence of the main track of the railroad company, side-tracks, the Y and certain other improvements, and of the very strong circumstantial evidence, the only direct evidence of the purpose of the company in purchasing this tract is the testimony of defendant in error's witness, W. L. Cabell, and of plaintiff in error's witness, W. H. Gaston (R. 130–133). Cabell was

one of the incorporators of the company, and testified that, being its land commissioner also, he purchased the tract in question for it. His testimony respecting the purpose of the company in purchasing the land is as follows, (R. 131–132):

> "*We bought the twenty-five acres for railroad purposes, laying down switches, and such things as that, and if the land was not required, to sell it into lots for the employees to live on. All that was necessary for the tracks and switches was to be used for that purpose.* When said twenty-five acres was purchased it was the intention of the company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots, and let the men employed by the railroad purchase them and build residences on them in order to be close to their work. That was the intention of the road, and *at the same time they were to use all that was necessary for switches and tracks and such things as that.* There was an old well on the 25 acres tract when we purchased it. All the land east of the well was to be sold off into lots. That was the understanding between us. That was our idea."

Thus it appears from testimony of this witness—obviously hostile to and interested against plaintiffs in error—that this tract was bought for terminal purposes, and that while such portions of it, if any, as should not be required for such purposes might be sold, yet "*all that was necessary for the tracks and switches was to be used for that purpose.*" Neither this witness nor any other ever testified, nor is there a word of evidence intimating that any portion of the tract was found by experience to be *unnecessary* for the purposes of the company. On the contrary, following up the testimony of this witness that all of the tract, if necessary, was to be used for railroad purposes, defendant in error's witness, Johnson, over the strenuous objections of their counsel, testified that *all* the tract, and *more too*, was needed (R. 127–128).

In answer to the question (R. 127) whether, if the railroad had been constructed as provided in its original charter, the twenty-five acres would have been necessary for the use of the company for terminals, yards and other railroad purposes, he testified:

> "*Yes, the company would need that twenty-five acres, or some other twenty-five acres contiguous. They ought to have forty acres.*"

In answer to the question whether the property was favorably situated for handling their connections with other railroads, etc., he answered:

> "I consider that a very convenient point; it is reached by several streets, and it is within reach of the connecting lines of railroads—the Santa Fe, the Central and the T. & P." (R. 127).

In answer to the question whether, as the railroad existed in 1888, that is, consisted of a line of fifty miles in length, if it were maintained in the average condition of other Texas railroads and had its own stations, terminals, shops, etc., in Dallas, instead of renting from others, the twenty-five acre tract in question was reasonably necessary, the witness answered:

> "*Yes, sir, I think they would have needed it. It would have given them conveniences which they would not have had on a narrower or smaller piece of land. There would have been warehouses for different branches of business, and machine shops, and turn-outs, and water stations, and depots, and other things, and I think the twenty-five acres would have been required for legitimate railroad purpurposes.*"

The same witness further testified (R. 129):

"There is no twenty-five acres of ground unoccupied in the city of Dallas better situated for the use of the Texas Trunk except Gaston's ground. They could have picked out twenty-five acres there adjoining it. Nothing nearer town was available. In my direct testimony, as to the amount of ground covered by the tract I only alluded to the end of the ties, and twelve feet between the tracks. They did not need this Mayes tract for depot purposes, but it would have helped them to put the track in better condition as ballast."

William Whyte, superintendent from 1891, and afterwards receiver of the road, testified respecting the necessity of the land for the purposes of the company as follows (R. 141):

"Q. Assuming that the Texas Trunk railroad takes care of its own engines, has its own round-house and engines, and its own yard and facilities, what do you say of the necessity of the twenty-five acre tract for the use of the company instead of using other companys' yards and facilities?"

To which he answered:

"A. *The ground would be absolutely necessary to have terminals; you could not get*

along without them; all of it would be necessary as it now stands. If the road were extended over the route called for by its charter from Dallas to Sabine Pass, with a branch from some point on its main line to the Sabine river, this twenty-five acres would not be enough."

And again (R. 142):

"Q. If the Texas Trunk should be put in the average condition of other Texas roads, state whether or not all of the tract would be necessary for it.

A. *All of the tract would be necessary, and more.*"

All this testimony respecting the *necessity* of the tract for railroad purposes was, as already indicated, wholly undisputed. Some of it came from the other side. As further proof of the intentions of the company and of the necessity of this tract for its purposes the testimony of Cabell representing what he designates as the "flat iron" tract is significant (R. 130). That was a tract occupying the space—about 400 feet—between the northwesterly end of the Hughes and Slaughter tract and the Texas & Pacific railroad and was owned by W. H. Gaston. Cabell testified that about the time of the purchase of

the Hughes and Slaughter tract the company contracted for the purchase of the "flat iron" tract from Gaston and intended to put on that tract machine shops, etc. The alleged "contract" does not appear to have assumed any definite form, or to have ever been expressed in writing. At any rate, the company paid Gaston nothing for the land, and consequently failed to get it, as Gaston never conveyed it, or otherwise gave them any right to it (R. 139). Doubtless the testimony of Cabell respecting the intended use of the "flat iron" tract was offered to show that it, rather than the Hughes and Slaughter tract, was intended for terminals, etc. This purpose, however, failed, not only because the company did not acquire the "flat iron" tract, but also because Cabell testified distinctly, as already stated, that the Hughes and Slaughter tract was purchased for terminal purposes as far as necessary. The failure to get the "flat iron" tract accentuated the necessity for *all* of the Hughes and Slaughter tract, and which, indeed, instead of being too much, was deemed inadequate without the other. The management was alive to the fact that extensive terminals were necessary for the line which the company was authorized by

its charter, and had in fact commenced to build. W. H. Gaston, who owned the "flat iron" tract, testified as follows (R. 138):

> "I have resided in Dallas thirty years. I am acquainted with the twenty-five acre tract bought from Hughes and Slaughter. I have known that land from 1879. I know something about the purpose for which that land was bought by the railroad company. I was encouraging the construction of the road and wanted to see it built. I talked with Mr. Henderson, who is now dead, and with General Cabell and others. They seemed to be the active men in it. I own land in the neighborhood of this twenty-five acres. I also owned this twenty-five acres at one time."

In answer to the question,

> "Do you know from circumstances coming to your knowledge at the time, what the twenty-five acres was acquired for by the Texas Trunk Railroad Company?"

The witness said:

> "I know what Henderson told me. *He wanted it for terminal purposes.*"

Continuing, the witness testified (R. 139):

> "*I know that Henderson was also trying*

to acquire other lands for the Texas Trunk Railroad Company for terminals; he wanted more. * * *

"*Henderson said he wanted to buy all told out there forty-five or fifty acres of land.* There were twenty-five acres in the Hughes and Slaughter tract, and I suppose about eight acres in the other land occupied by the railroad (Map and Record, p. 129), but to which they did not get the deed for. That would make thirty-three acres, and it would take seventeen acres more to make fifty acres. It is my recollection that in addition to the twenty-five acres, and in addition to this other land, he wanted seventeen acres more. None of the land was platted. Henderson wanted part of the flat-iron tract any way."

Henderson was general manager and chief engineer of the road, and was of course the man to select and plan the terminals, etc.

Respecting the purposes of the company in purchasing the Mayes tract, Cabell testified that it was the same—that is "the railroad used whatever was needed for tracks and sand, and the balance was to be divided up into lots."

There was no direct testimony to show ex-

actly the extent to which improvements were placed upon the property when the construction of the railroad was commenced. Cabell and Simpson were the only witnesses connected with the road at that time, and they did not attempt to testify to such facts, and evidently did not know or remember. But, at any rate, the main track of the railroad was constructed across both tracts, as were side tracks also. There were also on the Hughes and Slaughter tract railroad tracks connecting the Texas Trunk with the Gulf, Colorado & Santa Fe and other railroads. There was a small shop building, an engine house, a ticket office, and a water tank, at least placed upon the property. There was also a "Y" for turning engines and trains which extended almost entirely across the tract. Only one arm of the Y was there, however, at the time the map was made. Defendant in error's witness, Johnson, who prepared the map, was not acquainted with the property until after these improvements were placed thereon, and had no occasion to observe it, particularly as he was not connected with it until called upon to make the surveys on which said map was based. He testified in substance in his direct examination

(R. 124–129) that he had surveyed the two tracts in question in 1891 in connection with the proceedings commenced to forfeit the charter of the company, and again in 1895 at the request of defendants in error, and that the two maps found in the record (pages 124–125) correctly showed the railroad tracks and structures existing at the times of his examination. He was not certain, however, whether the maps were made from the survey of 1891 or the survey of June, 1895; that he did not know when the Y was built, but he found it there in 1891 in the condition shown on the map. He did not know when the connecting track with the Santa Fe Railroad was put in. The balance of the land, except as shown on the maps, had been vacant since 1890. The 510 feet of track shown on the map once forming part of the Y and the connecting tract with the Santa Fe had been taken up during the Dillingham receivership, and at the time of the trial there was no railroad property on the twenty-five acres except the main track and parallel siding. The twenty-five acre tract was not used as a terminal at the time of the trial. Since the road went into the hands of Dillingham, as receiver, a connection from the main

track below town to the H. & T. C. R. R. had been put in, and the Texas Trunk had been using the stations of the latter road. The Texas Trunk Railroad once had on the twenty-five acre tract a little box ticket office about twelve feet square, a car shed about sixty feet long and twenty-five feet wide, and a water tank holding about twelve hundred gallons. He did not know when these buildings were put on the property, but it was early in the existence of the railroad. The ticket office was worth about $25, the car shed about $50, and the tank about $75, or $100. These, with the tracks above mentioned, were all of the improvements of a railroad character ever on the property. The tracks on the Mayes tract are correctly shown on the map, page 125. The railroad company had been in the habit of taking sand from the Mayes tract, and in 1895, it had used about three acres for that purpose. It had never been used for any other purpose.

On cross examination he testified (R. 126):

> "I think the map represents the conditions existing in 1891 and 1895. It takes two horns to make a Y, but only one horn is shown on the map. I think the other horn

was once there. In addition to the two horns the Y needs a tail to get it on to the main track. This Y never had a tail when I saw it. The tail ought to run about 100 feet; that is, enough to change the engine and passenger cars; they did not run the entire train on the Y. The Texas Trunk only had one passenger car. Assuming that this Y had a tail 100 feet long, it would bring it to within about 75 feet of the northeast boundary line of the twenty-five acres. The north end of the Y would reach the main track about 600 feet from the south end. The first I knew of the car-shed on the property was in 1891. I was not familiar with the property before 1891. The tank was used to water locomotives and trains. There was wood brought in on the cars and stored there along the track. Ever since I have known the road it has been conducting a wood business. They run wood cars on that side track there, and unloaded them. Fourteen cars could be put there on the side track. They did not have but one train on the railroad at that time; fourteen cars and the engine. The connecting track with the Santa Fe railroad was there when I made this survey. The Texas Trunk railroad never owned any land in

the City of Dallas except this twenty-five acres."

The only other witness who testified as to the use of the property was plaintiff in error's witness, Wm. Whyte, who became superintendent of the road in 1891, and was afterward receiver. His testimony upon this point was as follows (R. 141–142):

> "When I first became connected with the road there was a small depot on the twenty-five acre tract, I think twelve by fourteen, not now in existence. There was a sand-house for drying sand and a blacksmith shop and an oil and waste house, and some small temporary buildings. I don't remember now the extent of them; we used these improvements at that time. That is all I had to do with when I started; we used that land as our terminal up to February, 1892, when when we connected with the H. &. T. C. There was no car-shed on the property when I first became connected with it. There was a foundation for a two-stall round-house—it was not a round-house, but a square house, but is termed a round-house. There was a foundation, wooden walls put down, and this drawing on the map (Record 124, 125) has

no resemblance to anything that was on the ground when I took charge of it. This little office and water-tank on the map is about correct as to location. My recollection is there was a complete Y on the property when I took charge. A Y has two curves and a stem. I cannot well locate on the map the other leg of the Y because the leg of the Y on the map is not located to suit; it was farther south. The stem of the Y was seventy-five or one hundred feet long, as well as I recollect. Both prongs of the Y connected with the main track of the Texas Trunk. I guess that the stem of the Y terminated about 150 feet from the north-east boundary of the twenty-five acres. I took that Y up. I used it about four months before it was taken up. I think I took it up in March, 1892, after I commenced running to the H. & T. C. terminals. I took it all up; no part of it is there now. The reason I took it up is because I had no iron to make repairs with on the main line and I had to have something, and as soon as I could dispense with it I took it up to make some repairs on the main line. The main line runs across that twenty-five acre tract. We have done switching over there to quite an extent. I suppose an acre and a half of it,

perhaps, was used for switches, and during the fair we would run passengers up there as convenience—to let them off near the fair grounds. It has been in continual use during the receivership to the extent indicated. The twenty-five acres has been used to unload freight on to some extent, and I have been fencing part of it to keep trespassers off, and I have been looking out for the property.

"We have been hauling sand from the Mayes tract for the last six or seven years to repair the roadbed, and for surfacing it and keeping it in order; it was necessary for that purpose. I presume about two acres of the land was used up to March 16th, 1896. There is no other place on the road where we could get sand to ballast the track except off the right-of-way. This Mayes tract is necessary for sand to ballast our track. I do not know how we could get along without it exactly."

It appears that the company used at different times the station facilities of other lines in Dallas—first the Texas & Pacific, next the Gulf, Colorado & Santa Fe, and finally the Houston & Texas Central. Such use, however, was under mere temporary arrangements, terminable

at the pleasure of either party. Defendants in error have dwelt upon this as evidence that the lands in question were not needed, or that the company did not intend to use them for railroad purposes. The unsoundness of such contention is apparent. The reason why facilities were rented from other lines temporarily, and why stations, yards, and other terminal facilities were not constructed on the property in question is obvious enough from this record, viz.: The chronic financial disability of the company, resulting largely from the litigation in which it was always involved.

Following the purchase of the Hughes and Slaughter tract in March, 1880, and the Mayes tract in February, 1881, the property of the company went into the hands of a receiver in December, 1881, and was sold upon the foreclosure of the International Trust Company mortgage in 1883. Certainly there was little time or opportunity for erecting permanent stations and other terminal facilities between the acquisition of the property and the receivership. Again, the purchasers at the foreclosure sale in 1883, seem to have been lacking in necessary means, for they defaulted in complying with the orders

of the court requiring further payments, and, as a result, the property was resold in 1885, to Schneider and associates. In October, 1886, the seizures and sale under various dormant judgments was made to E. M. Powell and associates (R. 106–111) and a cloud was thus placed upon the property, which was followed by suits in behalf of Powell and associates for its recovery. In 1889 the state proceeded against the company to forfeit its charter, which resulted in a decree of dissolution in September, 1891, a few days after the appointment of a receiver in the foreclosure proceedings, which resulted in the sale to plaintiffs in error.

In view of this history, it is not surprising that permanent stations and other terminal facilities were not erected upon this property, or that the company was forced to rent such facilities from other lines in Dallas. The only surprise is that it held the land through all its financial distress for the purposes originally intended.

What more conclusive evidence could there be that both these tracts of land were absolutely neccssary for the purposes of this company, if it were ever to accomplish the objects intended in its incorporation, or even to be a

railroad of any respectability, than the fact that it never sold, or never offered for sale, a foot of the land? Cabell testified that in purchasing it was intended that so much of each tract as was not needed should be divided into lots and blocks and sold. What better evidence that *all* of each tract was needed than that neither was ever subdivided into lots or blocks, nor a particle sold, or offered for sale, when all similar property in the neighborhood was being bought and sold and rapidly improved?

The foregoing is the substance of all the material testimony bearing upon the question as to whether, by reason of the uses to which the property was put, the intention of the company in purchasing it or the necessity of it in the use and operation of the road, or the situation of it with reference to the railroad, it was embraced in the decrees of the Circuit Court of the United States describing and directing the sale of the property covered by the mortgages thereby foreclosed. All other facts were covered by the written agreement of counsel (R. 75–124). The testimony of the witnesses Simpson (R. 134) and Moroney (R. 135), the only other witnesses not discussed in this connection, has no bearing whatever upon this question.

And, as we have so often said before, the evidence is wholly without controversy. This, we feel sure, opposing counsel will not deny.

On this testimony, the judge, upon the ground that the evidence was not conflicting, directed the jury to make the following finding as to the Hughes and Slaughter tract (Record, p. 18):

> "We, the jury, find that the 25-acre tract described in plaintiffs' petition as tract No. *b*, was bought by the Texas Trunk Railroad from Hughes and Slaughter, the deed is dated March 8, 1880, but was not delivered until several months thereafter, but during the year 1880, at the time it was purchased, it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the railroad and whatever switches and side tracks should be necessary in the operation of the road, and if these did not occupy all of the land then to sell lots on the eastern side of the land to its employees so that they might be near their work; no such sales have ever been made, nor has any part of the land been subdivided into lots; the railroad built its main track across the land near its western boundary, and also built a side track on it

and a Y near the center of it extending eastwardly across the land to beyond the center of the land and also a small house used as a ticket office and carshed; it used in the operation of its road up to 1892 the main and side track and houses; this was the only land the road owned in Dallas where it terminated; both as originally contemplated and as actually constructed, if the road had been properly constructed and operated it would have needed as much as 25 acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of such construction and operation.

K. J. KIVLEN, *Foreman.*"

The jury were also instructed to make the following finding as to the Mayes tract (Record, p. 19):

"We, the jury, find that the 11-92/100-acre tract described in plaintiffs' petition as tract No. *d*, was bought by the Texas Trunk railroad from Mayes and wife on February 2nd, 1881; it had on it sand; at the time of its purchase it was the purpose and intention of the railroad company, and its officers, to use the sand in the construction and ballasting of the road-bed, and also to place on it

such switches and side tracks as might be necessary in the operation of the road; the main track of the road was built across it near its eastern boundary, and also a spur track running out from the main track (but near to it) across the land so as to reach the sand; sand has since been taken from the land and used in the construction and repairing and ballasting the road; the road has occupied about two acres of the tract; if the road was properly constructed and operated it would be necessary to use sand in order to do so properly and successfully.

K. J. KIVLEN, *Foreman.*"

The foregoing findings being by direction of the court, and upon the material questions in the case must be deemed to be controlling. If there is any inconsistency between these findings and any special issues found by the jury at the request of plaintiffs' counsel, the findings by direction of the court would seem to be the findings which should govern, or else the two findings nullify each other, and the jury failed to make any finding upon the question.

If the findings of the jury, which we have quoted, are to be deemed the findings in this case, then our position is, that this court has the

right to examine and consider the facts thus found, and say whether as a matter of law, upon these facts, the land in question was embraced by the mortgages executed by the railroad company and the title thereto acquired by the plaintiffs in error by reason of the various decrees of the Federal Court for the Northern District of Texas.

Now we maintain that the uncontroverted evidence establishes the following facts:

1. Both tracts of land were bought by the company for railroad purposes.

2. If the road had been constructed as originally contemplated, both tracts of land would not only have been necessary, but would have been insufficient for the purposes of the company.

3. Irrespective of the line as originally contemplated, but considering it as it was actually constructed and as it stands to-day, if it were properly operated and maintained, and if it had its own shops, stations, yards and terminals, instead of renting them at the will of other lines, both tracts were and are absolutely necessary.

4. The main track of the road was originally constructed across both these tracts of land, and has ever since been used and operated thereon,

and so stands to-day. When the mortgages were executed the company had a passenger station, a car and engine shed, a water station, several side-tracks and a "Y" on the Hughes and Slaughter tract. The main track was constructed across that tract its entire length near the western boundary. The "Y" extended (with its center of course practically at right angles with the main track) almost entirely across the tract—that is, with its "tail," or stem within about 175 feet of the northern boundary, as shown by the testimony of plaintiffs' witness, Johnson, and within about 150 feet of it, as shown by the testimony of Wm. Whyte. It had been taken up when the maps in the record were made by Johnson. The map shows only one prong. Assuming that the northeast end of the prong, as shown on the map, was where the other prong connected with it, and adding to that a stem of 100 or 125 feet in length, which it must have been, as shown by the witnesses, the court will see that it extended practically across the tract.

5. The Mayes tract is crossed by the main track of the road, and side-tracks are laid upon it for the purpose of taking out sand to be used in maintaining the road in the "black land"

country through which it is constructed. About three acres of the tract had been used for that purpose, as shown by Johnson's testimony, when he examined the road first in 1891. Both Whyte and Johnson testified that the Mayes tract was necessary to the company for the purpose of affording sand required in maintaining its track.

6. *The Texas Trunk Railroad Company never owned, and does not now own, another foot of land in the City of Dallas except the Hughes and Slaughter tract.* If that is held not to pertain to the railroad, or not to belong to the owners of the railroad, then it owns no other ground in the city, or nearer to the city than the Mayes tract—a distance of about three miles—upon which to construct stations, terminals, etc., though its line terminates in that important city.

7. Though both tracts of land were bought by the company in 1880, twenty years ago, and though all the land surrounding the Hughes and Slaughter tract was years ago platted and sold as city lots, and is now thickly settled, no part of the tract has ever been platted or sold, or offered for sale, but has been held for railroad purposes, and has been regarded apparently by

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every one except the plaintiffs as necessarily and properly held for the use and legitimate purposes of the railroad company in connection with its road.

8. In the sale of the property under the contractor's judgment in 1885, against the company, as reorganized by the purchasers, at the sale under the International Trust Company mortgage, the two tracts of land in controversy were levied upon and specifically described, and were ever afterward claimed by the company organized by the purchasers at such sale, and which executed the mortgage to the Central Trust Company.

It is important in this connection to consider the requirements of the law as settled by the Supreme Court of Texas respecting the sufficiency of descriptions of property sold under judicial process in that state. In *Smith vs. Crosby, 86 Texas, 15*, Chief Justice STAYTON said, (pages 21–22):

> "The law does not require that in such sales the description must be such that the land may be identified by inspection of the levy and deed; and if the description be general, but sufficiently accurate to enable

parties to identify the land levied upon and conveyed, by the use of such means as would be admissible in a court of justice for that purpose, then the description should be deemed sufficient. * * *

"If the general description be accurate, and such that, following and applying it, purchasers, by the use of that diligence and care usually exercised in examining title and ascertaining the value of land they contemplate purchasing, may ascertain what particular land or interest in it is offered for sale, can it be said that such persons have not present means of knowing what is offered for sale?

"Can it be said, when land or interest in it is so described, that bidders have not means of informing themselves of its value?"

The court quoted with approval (page 24) the language of this court in White vs. Luning, 93 U. S., 514, 523, as follows:

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with

legal rules, the object they were intended to accomplish."

Prospective bidders and the public would have undoubtedly understood from the decrees under consideration (R. 153, 159), that all and singular the Texas Trunk Railroad, including the right-of-way, roadbed, all lands and depot grounds, station houses and depot, materials and property purchased and to be purchased for the construction and equipment of the road, all machine shops, and all appurtenances and appendages of said railroad and property of said company theretofore acquired, or which might be acquired in the state of Texas, used and pertaining to the operation of said railroad, was to be sold at the time appointed. In the same case the court further said (86 Texas, 23–24):

> "No prudent man, contemplating the purchase of land at sheriff's sale under execution, relies upon the levy or proposition of the sheriff to sell, in determining what part or interest in a tract of land, sufficiently described in a levy and offer to sell, he will acquire right to under a purchase; nor can he claim that it is the duty of the creditor to exercise a higher degree of care for his

benefit in directing the levy than self-interest will induce the purchaser to exercise for his own protection. The purpose of advertisement is not solely to give notice of the time and place the sale will be made, but is also to afford persons desiring to purchase an opportunity to examine title and to determine for themselves what land or interest in land they can acquire by purchase."

And in the later case of *Herman vs. Likens*, *90 Texas, 455*, the same court used this language:

"But to bidders in general, who have no special knowledge of the facts, the deed can never convey a precise idea of the land itself. Even if field notes be given they must search for the land upon the ground or have the boundaries pointed out to them. So if it be a lot in a town or city the map must be referred to and applied to the ground, or the lots be in some manner designated by some one who is familiar with the locality."

Any person who contemplated the purchase of this property at foreclosure sale would have done as the court in those cases said he should do. After reading the notice he would have probably inquired as to the number of miles of railroad

then constructed and in operation, and would have doubtless examined them. The next, if not the first, inquiry occurring to him would have been as to the company's terminal facilities at Dallas. He would have found, upon examination, that the main track of the road was constructed across both of the tracts of land in question, and that both were being used to some extent at least for railroad purposes. He would have observed that the Hughes and Slaughter tract was otherwise vacant; that the company had no other stations or buildings and no other terminals and no ground upon which to construct them; that this land was well adapted for terminal purposes, and that there was no other suitable land available. If he was expecting to purchase at the sale under the International Trust Company mortgage, he would have found the property extensively used at the time for terminal purposes, and that while the structures were inadequate and insufficient, he would have attributed this to the fact that the construction of the road had just been commenced, and that, instead of spending its funds for extensive terminals at the outset, the company had expended its means in extending its line—deferring terminal improve-

ments until there was more need for them and more need for building them in a substantial manner. He would have ascertained, upon inquiry of the officers of the company, that this land was bought for terminal and other railroad purposes; that while it might have been expected at one time to sell a portion of it to employes he would have found that this was based upon the expectation of owning the "flat iron" tract, which was never acquired, and that, in the judgment of the officers, all of the twenty-five acres was therefore necessary and had been held accordingly. If intending to purchase at the foreclosure of the Central Trust Company mortgage, he would have found the same facts existing in a great measure, except that the facilities of the H. & T. C. R. Co. were then being temporarily used without cost, etc.; and he would have also found that just a few weeks before the Federal Court had determined, in the case of Atkins, receiver, vs. Campbell, et al., that the property was covered by the mortgage under foreclosure and would go to the purchaser at the sale. With reference to the Mayes tract he would have found the same facts except that it was intended to furnish and was furnishing sand to be used in ballasting the

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road, the necessity for which would have been fully demonstrated to him if he had taken, as he doubtless would have attempted to do, a trip over the road before bidding.

At the time of either sale an examination of the records or a visit to an abstractor's office would have disclosed to him that *the Texas Trunk Railroad Company did not own a foot of land in the City of Dallas except the 25 acre tract.* From this he would have at once concluded that it appertained to the railroad, irrespective of other information, for he never would have supposed that a railroad company, constructing a railroad from a point in the city of Dallas, and owning twenty-five acres of land crossed by its main track and admirably adapted to the uses of the company, would have sold, or intended to sell, or devote the property to some town lot scheme, leaving itself *absolutely without a foot of ground for stations, shops, yards, terminals and all the facilities demanded at the terminus of a railroad line in such a city.*

If *land* is being sold, of course it must be described as *land* and so that it can be identified by some of the methods employed in locating and identifying land. If property is being sold as a

railroad and its appurtenances, of course it is to be described as such. A "railroad" consists of many elements—of rails, ties, spikes, main track, side tracks, stations, shops, structures of various kinds, right-of-way, grounds for section-houses, stations, etc. The only purpose of description is to indicate and provide means to identify the property sold. Whatever accomplishes this purpose is, we submit, sufficient. According to plaintiff's contention, if carried to its logical result, even the right-of-way was not covered by the mortgages and decrees because it was not described by metes and bounds, or so that it could be identified by an inspection of the mortgages and decrees. The absurdity of such proposition appears from its mere statement.

The strange mistake of the Court of Appeals in holding that the property in question was not covered by the mortgages and forclosure decrees is explained by the fact that it was based upon a decision which had been overruled. When it came to apply the law to the case (R. 207–208) the court quoted from *Shirley vs. Waco Tap Ry. Co., 78 Texas, 131, 136*, in which the opinion was prepared by the Commission of Appeals, as follows:

"The authorities are abundant to the effect that, whether subsequently acquired property is included in a conveyance executed by a railway company depends upon its being necessary to the enjoyment of the franchise or the operation of the road in the absence of special description of it in the conveyance. So a conveyance of all its property, real and personal, acquired or to be acquired, owned or to be owned, used or appropriated for operating and maintaining the road does not include lands acquired by the company and not thus used or employed."

The Court of Civil Appeals then adds:

"Applying the rule here announced that the after acquired property to become subject to mortgage must be "used or employed," then the evidence warrants the conclusion that the International Trust Company mortgage did not embrace the land sued for."

Shirley vs. Waco Tap Ry. Co., was in effect overruled by the Supreme Court of Texas in *Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 356.* But, even if the Shirley case be the law, it was misapplied by the Court of Civil Appeals in this case. As a matter of fact the Hughes and

Slaughter tract was acquired *before*, and not *after*, the execution of the International Trust Company mortgage. It was alleged in plaintiffs' petition, subdivision "(*b*)" (R. 2) that the property was conveyed to the company by deed dated March 13th, 1880, and the parties agreed in writing that this allegation was true (R. 75–76). Defendants in error offered to prove by Cabell, and by certain documents in connection with his testimony, that the final consideration was not actually paid until September, 1880, but such evidence was ruled out by the court (R. 131) and could not be considered by the Court of Civil Appeals as evidence in the case. The mortgage to the International Trust Company was dated March 22nd, 1880,—some days after the date of the deed conveying the property to the company.

But if it be conceded that the property was not acquired until after the mortgage was executed, surely it cannot be the law that it was not subject to mortgage by the company until it had been put into actual use. The company had just been organized and was only about beginning the construction of its road. It certainly had the right to buy property needed for terminals and other uses in connection with the line

to be constructed. The fact that several months might elapse before said property would be put into actual use certainly would not prevent it from being covered by a mortgage embracing, as the mortgage to the International Trust Company does, "the railroad, the right-of-way, all lands and depot grounds and property purchased and to be purchased for the construction and equipment of the road," etc. (R. 79–80).

The effect of the decision of the Court of Civil Appeals, as applied to the facts of this case, is that a railroad company may not mortgage any after-acquired property unless such property be necessary "to the enjoyment of the franchise or operation of the road," as held in the Shirley case; and unless the same be also actually "used or employed," as held by the Court of Civil Appeals in this case. In other words, no matter if the railroad company executes a mortgage upon everything it owns and afterward acquires in terms as broad and sweeping as they can be made, such mortgage will not extend to any after-acquired property unless the bondholders are able to assume and sustain the burden of proof that the after-acquired property was necessary in the use of the road, and, further, accord-

ing to the decision of the Court of Civil Appeals, that it was actually *used* or *employed* in the operation of the road.

Of course it is impossible to "specifically describe" (if by that is meant description by metes and bounds, or such other descriptions as are usually given in deeds) lands, etc., not acquired until after the mortgage is made. So the effect of the decision in this case is to hold that no valid mortgage can be executed upon after-acquired property of a railroad company unless, before the claim of some other person intervenes, the property is actually brought into use in the operation of the road. Certainly such is not the law. As we understand the decision in the Shirley case, first cited, and of the Court of Civil Appeals in this case, they make it a question of power to mortgage, and yet under the statutes of Texas the power of railroad companies to mortgage is co-extensive with their power to own property, and certainly railroad companies are not limited in the right to acquire to that absolutely *necessary* at the *very time* it is acquired. A tract of land may not be necessary to the actual construction of the road, the running of trains or operation of the road generally,

yet it may be used to increase the facilities afforded to the public to economize the expenses of operation and maintenance, etc., and if so, we submit that if actually acquired for that purpose and in good faith intended to be so used, it would be covered by a mortgage in the terms used in the mortgage in question in this case. The view adopted by the Court of Civil Appeals limits railroad companies to the property actually necessary under conditions existing at the time the mortgage was executed, cutting off all right to acquire land demanded by the road when finally completed, as contemplated by its charter, or for the improvement of facilities for the public, the cheapening of the cost of maintenance and operation, and for the increasing demands of growing population and traffic. The unreasonableness of any such rule is well illustrated by the facts of this case, in which the Court of Civil Appeals has in effect held that a railroad company without a foot of ground in one of the largest and perhaps the most thriving cities in the state and the terminus of its line, cannot hold or mortgage as a part of its road a piece of ground that the uncontroverted testimony of all the witnesses shows is necessary for terminals, yards and

other facilities, and which is adapted to that purpose.

The mortgage to the International Trust Company includes "all appurtenances and appendages of said road and the property of said company now acquired, or which may be acquired in the State of Texas, used for and pertaining to the operation of the railroad." It seems abundantly clear from the evidence that the property here in question was "used" for and "pertained" to the operation of the railroad. But the mortgage here also covered "all and singular the railroad," which would include the right-of-way and other real estate appertaining to it. More important still, it included "all lands and depot grounds, station houses and depots." This included something more than the right-of-way; and effect must be given to the words. The property in question is certainly "lands," and there is no question under the evidence that it is also "depot grounds." The mortgage also covered "property purchased and to be purchased for the construction and equipment of said road." There is no room for doubt under the evidence that this property was purchased for the construction and equipment of the

road—not merely as a place on which to lay the track, but for use as terminals and for other facilities required in the proper construction and equipment of the road. It also covered all "machine shops," whether then owned or thereafter acquired, and which of course would include the ground for the same.

We observe now what is perhaps the most remarkable feature of this case. Defendants in error sued for *all* the Hughes and Slaughter tract and for *all* the Mayes tract—describing each by metes and bounds (see their petition, subdivisions "(b)" and "(d)", R. 2–3). At the close of the evidence they filed (R. 150) an admission and disclaimer as to the *railroad* "embracing the ground actually occupied by its tracks and structures used for railroad purposes, and a right-of-way fifty feet in width on each side of the center of its main track as constructed on the 25 acre" Hughes and Slaughter tract, and "embracing also a right-of-way 100 feet in width on each side of the center of the main track of the said railroad where it may cross any of the other lands involved in this suit"—the Mayes tract, for instance. The Court of Civil Appeals excepted such right-of-way when it reversed the judgment

of the District Court and rendered judgment in favor of defendants in error for said tracts (R. 210-211).

There was no pretense in the evidence or elsewhere that the strip 100 feet in width across the Hughes and Slaughter tract, or the strip 200 feet in width across the Mayes tract thus excepted had been segregated by any deed, decree, dedication, survey, map or otherwise. Even the maps prepared by plaintiff's witness, Johnson (R. 124-125), did not pretend to give any such lines or contemplate any such segregation. There are no monuments to mark the lines thus arbitrarily drawn by counsel and the court. And naturally we wonder why the line was drawn at a strip 100 feet in width on the Hughes and Slaughter tract, for instance. Why not at 50 feet or at 75 feet or at 200 feet? Indeed, why not at the end of the ties? Certainly the plaintiffs in error might, with equal propriety, have recovered all except that occupied by the rails and ties, say a strip eight feet in width. There is just as much use for the rest of the tract for railroad purposes as there is for that portion of the 100-foot strip outside of the narrow space actually covered by the rails and ties.

The careful pruning and trimming of the foreclosure decrees of the Federal Court by counsel for defendants in error and the Court of Civil Appeals becomes almost ridiculous when it is observed that the disclaimer and judgment left to the railroad company a right-of-way 200 feet in width everywhere except across the Hughes and Slaughter tract, and there it was restricted to 100 feet. The Mayes tract and such country lands, if any, as should be crossed by the railroad were cheap, and therefore defendants in error could afford to allow a right-of-way 200 feet in width, although in the country there would be much less need for so wide a space than in the city. But with the Hughes and Slaughter tract located as it is in the city and being very valuable it was different; and when they came to that tract they were not quite so generous. Although there was obviously need for a wider right-of-way at the terminus in the city than in the country, yet it was restricted to 100 feet in width across the Hughes and Slaughter tract, while 200 feet in width was allowed everywhere else!

Thus it appears that defendants in error and the Court of Civil Appeals trimmed the decrees of the Circuit Court to suit their purpose,

and carved out of the property covered by them just such portions as were wanted. Defendants in error, as it were, said: "The Mayes tract and the other lands outside of the city are not very valuable. Therefore we will allow the decrees of the Federal Court foreclosing the mortgages to extend to a right-of-way 200 feet in width. But the Hughes and Slaughter tract is quite valuable and we can readily sell every foot of it. Therefore, we will only allow such decrees to extend to a strip 100 feet in width."

Now, we submit that decrees of the courts of the United States cannot thus be trifled with and trampled upon. They embrace either all of the two tracts in question or none. The court sold "all and singular the railroad * * * including the right-of-way, roadbed, * * * *all lands and depot grounds*, station houses, * * * and property purchased, and to be purchased, for the construction and equipment of said road, * * * and all the franchises and rights of said railroad company, together with all machine shops, * * * including all appendages and appurtenances of said railroad," (R. 153–159). The main track of the railroad was constructed and in operation across both of the

tracts of land (R. 124–125). There was not and had never been any division of either tract,—no survey made, or monuments set, or decree rendered, or deed executed, or maps recorded to mark the limits of any "right-of-way," or to mark out what portions should be for side-tracks and yards and what portions for freight stations and what portions for passenger stations, and what portions for shops, etc. Each tract existed as a whole—described by metes and bounds as in the deeds of conveyance, and as set forth in the pleadings and judgment; and according to the uncontroverted facts each had been reserved intact for railroad purposes and had been used and occupied for such purposes from the time of their acquisition in the early days of the enterprise to the date of the trial. Each had been possessed and used in connection with the operation of the railroad by the receivers of the Federal Court in the foreclosure suits, and each had been surrendered by such receivers to the purchasers at foreclosure sale without any question or suggestion as to divisions or subdivisions, or otherwise than as a part of the railroad plant passing under the decrees.

That the decrees of foreclosure embraced at

least a portion of each of said tracts since the main track of the railroad sold was constructed across both tracts is perfectly obvious. Even opposing counsel and the Court of Civil Appeals were bound to admit this in view of this record. Now if such decrees did not embrace all, what portion was omitted? The decrees themselves made no exception. Who is to draw the line and to fix the limits? Counsel for defendants in error have undertaken to do so, and the Court of Civil Appeals has sustained their action. Have they that power? May they, while conceding, as they are bound to do, that the decrees embraced at least a portion of the property, arrogate to themselves the right and power to restrict such decrees to a trifling portion of the property and carve out such portion as their own interest prompts them to appropriate?

We submit that since the foreclosure decrees confessedly embraced at least a portion of the tracts and do not exclude any portion, the intention was to embrace all of each, and this too without regard to any evidence showing the use and necessity of the entire tract for railroad purposes. And when we turn to the undisputed evidence showing that the company bought both

tracts for railroad purposes ; that both were used for railroad purposes according to the varying needs and ability of the company ; that no part of either was ever devoted to any other purpose ; that through all the financial distress of the company all of each tract was steadfastly held and reserved for railroad purposes, the error of the Court of Civil Appeals in sustaining the almost audacious appropriation by defendants in error of all the land, except a narrow unmarked strip which is retained by their grace, is apparent.

THIRD POINT.

The property being in the custody of the Federal Court, through its receiver appointed in the proceedings therein pending for the foreclosure of the mortgage to the Central Trust Company, sales thereof under process of other courts and by other parties in disregard of the possession of the Federal Court were void.

The Central Trust Company presented its bill for the foreclosure of the mortgage executed by the Texas Trunk Railroad Company to it, as trustee, to Circuit Judge PARDEE, September 4th, 1891, and on the same day Judge PARDEE ap-

pointed Charles Dillingham Receiver of the mortgaged property, (R. 94–95). Dillingham promptly qualified and continued to act as receiver until November 30th, 1892, when he resigned, and George T. Atkins was appointed and duly qualified as receiver to succeed him (R. 79). Atkins continued as receiver until August 5th, 1896, when he was removed by Circuit Judge McCormick, and Wm. Whyte was appointed receiver in his place (R. 103–106) and continued to act as receiver until after the rendition of the judgment against and the execution of the deeds by the trustees of the sold out railroad company, through which defendants in error claim.

The executions in the case of Thompson vs. Texas Trunk Railroad Company were issued and levied in March and August, 1895, and the sales thereunder were made in April and October, 1895 (R. 116). The judgment in Bumpas vs. Ely, et al., was rendered in April, 1898 (R. 118), and the pretended deed from the surviving directors to Bumpas was executed in December, 1897 (R. 120).

Plaintiffs in error introduced upon the trial the proceedings and the decree of the Circuit Court of the United States in the suit brought

by George T. Atkins, as receiver of said court, against E. M. Powell and associates (styled "George T. Atkins, Receiver, vs. C. T. Campbell, et al.") to clear the title to the property, and particularly to the Hughes and Slaughter tract and the Mayes tract (R. 111–114). Plaintiffs in error then specially requested the court in due form to instruct the jury that such proceedings and decree were effectual to establish and bring into custody of the Federal Court, through George T. Atkins, its receiver, the two tracts of land in question, but the request was refused (R. 36–37).

It would seem to be entirely clear from such proceedings that the two tracts of land in controversy were in the custody of the Circuit Court of the United States, through its receiver appointed in the foreclosure proceedings therein pending. The receiver was in actual possession, at least to the extent that the property was occupied by the railroad tracks (see maps pp. 124, 125) and was exercising control over and paying taxes on the property. Under the direction of that court he commenced and prosecuted a proceeding to cancel adverse claims and remove the same as a cloud upon his right to the property,

the object of which, of course, was to clear up the title to the whole property and prevent its sacrifice on account of doubt as to the title at the foreclosure sale then pending. By the decree in the suit thus brought by the receiver against the adverse claimants the court specifically and formally adjudicated that the property was in its custody. This was necessarily the result of the decree because, if it was not covered by the mortgage to the Central Trust Company and was not in the custody of the court, through the receiver in the proceeding for the foreclosure of that mortgage, neither the court nor its receiver had anything to do with it. Under such circumstances its receiver would, of course, have no right to maintain a suit to clear the title to the property, for he would have no interest therein, since the right of possession and control by the court was limited to the property covered by the mortgage under foreclosure.

Whether the property was covered by such mortgage and whether it was covered by the mortgage to the International Trust Company and the decree foreclosing the same against the original Texas Trunk Railroad Company, were issues presented, and constituted the main con-

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troversies in the suit of Atkins, Receiver vs. Campbell, and by rendering the decree in favor of the receiver (R. 112, 113) the Circuit Court definitely determined that both of said mortgages and the decrees foreclosing them embraced the property in controversy.

Whether that decree was correct is a question not now open to controversy. It was not only binding as between the parties to that suit and an adjudication between them finally respecting the title, as well as the possession, but it was also binding on all persons, whether parties to that suit or not, so far as the court's *possession* was concerned. By that decree, if not before, the Federal Court asserted its possession of the property, and, whether the possession was rightful or wrongful is not a matter of any consequence. If defendants in error, or any other persons, deemed the possession wrongful, it was their duty to apply to that court and have the question determined. They had no right to ignore the possession and proceed in contempt of it, as they did, no matter how wrongful the possession may have been. If they believed that the property was not covered by the mortgage to the International Trust Company and by the decree

foreclosing it, nor by the mortgage to the Central Trust Company, it was the duty of the surviving directors of the Texas Trunk Railroad Company, claiming title to it, to apply to the Federal Court, setting up their right to the property and ask for its possession; or it was the duty of the creditors of the original company to make such application.

We submit that the fact that plaintiffs in error were not parties to the foreclosure proceeding in which the receiver was appointed and acting does not affect the question respecting the validity of their acts in reference to the title to the property done while it was in possession of the receiver. It is well settled, of course, that where property in the custody of one court, through a receiver, is sold under process of other courts, against the defendant, such sales are absolutely void (*Wiswall vs. Sampson, 14 How., 52; Davis vs. Gray, 16 Wallace, 203; Porter vs. Sabin, 149 U. S., 473; in re Tyler, 149 U. S., 181; Edwards vs. Norton, 55 Texas, 410; Russell vs. T. & P. Ry. Co., 68 Texas, 646; Ellis vs. Water Co., 86 Texas, 109; Texas Trunk R. Co., vs. Lewis, 81 Texas, 1*).

Upon the same principle every sale sought to be made of property while in the custody of a

court for administration and distribution, and in hostility to the title there held, no matter whether under legal process or voluntarily, and no matter whether the vendor or vendee are parties to the receivership litigation or not, should be declared void.

In *Scott vs. Crawford*, decided by the Texas Court of Civil Appeals (16 T. C. A., 477; S. C., 41 S. W. Rep., 697), it appears that the owners of certain land, to secure the payment of an indebtedness, conveyed the same to a trustee with power to sell it at public auction after certain notice in case of default in the payment of the indebtedness, etc. They subsequently, and without payment of the debt, conveyed the land, or their equity in it, to a corporation. The corporation became insolvent, and its assets, including the land, were placed in the hands of a receiver. While the property was held by the receiver the trustee, in the exercise of the power conferred by the deed of trust, sold the land at public auction, after notice and in the manner specified in the deed. It thus appears that neither the holder of the notes, who had the sale made under the deed of trust, nor the maker of such notes, nor the purchaser at the sale were

parties to the receivership suit. Yet the court held the sale void because the property was at the time in the hands of the receiver. After citing the leading case of *Wiswall vs. Sampson* and quoting from the opinion therein to the effect that the title to the property in the custody of a court is bound from the filing of the bill, etc., the Texas Court said (16 T. C. A., 480):

> "If this invalidity results from the 'title being bound' when the land is placed in the possession of a receiver, as is declared by this decision, then no sale of any character, whether under a deed of trust, power of attorney, process of court, or otherwise, can affect the title in the hands of the receiver if made without consent of the court having custody thereof."

This seems to be the logical and necessary result of the principle. When a court takes possession of property through a receiver in foreclosure proceedings, it is for the purpose of preserving it pending the litigation and passing the title of the mortgagor on to some purchaser at foreclosure sale. In case of an insolvent corporation especially the proceeding is *in rem.* All persons interested in the property as claim-

ants, creditors or otherwise, are charged by law with notice of the court's possession, and any claims they may have should and must be asserted in that court. If they are allowed to ignore the court and its possession and control of the property, and traffic in the title freely and as they please, and in hostility to the title held by the court, the court will be embarrassed in the administration of the property and may be absolutely prevented from passing a marketable title.

The evil results of such trafficking in the title to property in the custody of a court is afforded by this case. The railroad company was ruined by litigation before the final foreclosure proceedings against it. During such proceedings the receiver, with the hope of removing the only known cloud upon the title, commenced the suit against C. T. Campbell and others, and prosecuted it to a successful termination. The plaintiffs in this case, however, secured control of some old judgment that had been supposed for fifteen years to be worthless; procured the issuance of executions under it against a dissolved corporation, and, without notice to the receiver of the Federal Court, or to any one

interested in the property, caused such executions to be levied upon the land in controversy, and had the same sold and bought in for a nominal consideration by an employe in the office of plaintiffs' counsel.

We respectfully submit, therefore, that in any aspect of the case the claim which the defendants in error put forward was acquired in contempt of the orders of the Circuit Court of the United States which had the property in custody through its receiver in the foreclosure suit, and such claim is therefore void.

FOURTH POINT.

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in so far as it awarded the Hughes and Slaughter tract and the Mayes tract to the defendants in error should be reversed.

R. S. LOVETT,
MAXWELL EVARTS,
Of Counsel for Plaintiffs in Error.

COPY.

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Clerk.

Supreme Court of the United States

OCTOBER TERM, 1902.

No. 237.

EDWARD H. FARDEE ET AL.,
Plaintiffs in Error,
vs.
A. D. ALDRIDGE ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE [illegible] SUPREME JUDICIAL DISTRICT OF TEXAS.

Reply Brief for Plaintiffs in Error.

A. S. LOVETT,
MAXWELL EVARTS,
Counsel for Plaintiffs in Error.

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Supreme Court of the United States,

OCTOBER TERM, 1902.

No. 137.

EDWARD H. PARDEE ET AL.,
Plaintiffs in Error,

vs.

A. D. ALDRIDGE ET AL.,
Defendants in Error.

In Error to the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

Pursuant to leave granted upon conclusion of the oral argument, plaintiffs in error come now and reply to some of the points presented in the brief for defendants in error, which for lack of time were not noticed in the oral argument.

Absence of application to State Supreme Court for writ of error.

One of the grounds urged by the defendants in error for the dismissal of the writ of error is that the record does not contain a copy of the application made by plaintiffs in error to the State Supreme Court for writ of error to the Court of Civil Appeals. But, the answer is that such application is no part of the record in the Court of Civil Appeals. The application is in the form of a petition addressed to the Supreme Court. It is filed with the Clerk of the Court of Civil Appeals, whose duty it thereupon becomes to forward the same, together with the record of the Court of Civil Appeals and copies of all the orders of that Court, to the Supreme Court (Rev. Stat. Texas 1895, Art. 942). If error appears, the Supreme Court retains the record and determines the cause finally, rendering therein such judgment as the Court of Civil Appeals should have rendered; and in such case a writ of error from this Court would go to the Supreme Court. But, if no error appears, the Supreme Court refuses the writ, whereupon its clerk returns the record of the Court of Civil Appeals to the clerk

of that Court, but retains as a record of the Supreme Court the petition or application for the writ. Rule 4 of the Supreme Court of Texas reads as follows:

> "Upon refusal by this court of an application for a writ of error, the clerk shall retain the application, together with the transcript and accompanying papers, for fifteen days from the day of the rendition of the judgment refusing the writ. At the end of which time, if no motion for a rehearing has been filed, * * * he shall transmit to the clerk of the court of civil appeals to which the writ of error was sought to be sued out, a certified copy of the orders of this court denying such application, and overruling the motion for rehearing, in case such motion has been filed; and shall return the file papers of that court to the clerk thereof, *but shall not return the petition for the writ of error*," *etc.*

Obviously, therefore, the petition for writ of error is no part of the record of the Court of Civil Appeals.

We had supposed that further controversy respecting this matter was precluded by the decision of this Court in *Bacon* v. *Texas*, 163

U. S., 207, where it was definitely determined that writs of error from this Court based upon the denial of a federal right should be addressed to the Court of Civil Appeals and not to the Supreme Court of Texas in cases where the latter court refused to take jurisdiction of and review the case. A reference to the original record in this Court of the case of *Bacon* v. *Texas* will show that it did not contain a copy of the application to the Supreme Court of Texas for a writ of error.

The certified copy of the order of the Supreme Court of Texas refusing the writ of error which the Clerk of that Court is required to send to the Clerk of the Court of Civil Appeals, properly becomes a part of the record of the latter Court, and such order will be found in the record of the case at bar, page 227. This appearing, we submit that the record is complete and shows that the State Supreme Court refused to review the rulings of the Court of Civil Appeals. The proceedings of the Court of Civil Appeals is the only matter before the Court, and it should be presumed, as a matter of course, that our application to the State Supreme Court sought a review of all the errors committed by the Court

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of Civil Appeals (as it did in fact) and of which complaint is still made.

EXCEPTIONS TO THE CHARGE.

Another ground of the motion to dismiss the writ of error is that plaintiffs in error failed to reserve a bill of exceptions to the action of the trial court in refusing special charges 8, 9, 10, 11 and 12 (Record 34–37). A complete answer to this would seem to be afforded by Article 1,320 of the Revised Statutes of Texas, 1895, which reads as follows:

> "When the instructions asked, or some of them, are refused, * * * such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exceptions thereto."

It seems to be argued however that, notwithstanding such statute, this Court is without power to consider the federal question unless the point shall be presented by exception taken in the manner prescribed by procedure in the Federal Courts of original jurisdiction. The result of the contention is that if a litigant in a State Court

has a federal right involved, he must, in order to preserve it for review by this Court, observe on the trial the mode of procedure obtaining in the Federal Circuit Courts rather than the procedure of the Court in which the trial takes place, no matter how inconsistent such modes may be. Of course such is not the law. If the trial of this case had occurred in a Federal Circuit Court, objection to the consideration of the ruling in refusing the special charges would be well taken because no exceptions to such ruling were reserved as required by the practice of such Courts. But on a writ of error from this Court to a State Court under Section 709, U. S. R. S., this Court takes the record as it is made in the State Court and considers any ruling involving a federal right that is complained of within the time and is preserved in the manner required by the State statutes or rules governing the practice of the State Court. The reason for and necessity of this are obvious.

In the same connection defendants in error also dwell upon that provision of Section 709, U. S. R. S. to the effect that the writ from this Court "shall have the same effect as if the judgment or decree complained of had been rendered

or passed in a court of the United States." This, of course, only means that the efficacy of the writ shall be the same; and has to do only with the transmission of the record to this Court, and not with the forms or modes of procedure respecting matters occurring on the trial or at any time before the allowance of the writ from this Court.

ALLEGED ABANDONMENT OF FEDERAL RIGHT.

In subdivision "C" of defendant's brief (pages 24–31) it seems to be argued in support of the motions to dismiss the writ of error that because the case was submitted to the jury on special issues, and because plaintiffs in error did not in some different and unnamed form complain of the action of the Court in submitting special issues, and did not move to set aside the verdict of the jury, they lost the benefit of their contention that the foreclosure decrees of the Federal Court embraced the Hughes & Slaughter tract and the Mayes tract. There seem to be several conclusive answers to this argument.

(1) The most obvious one is that as the facts found by the jury in reference to the two tracts named in obedience to the instructions of the

Court (Record, pp. 41–42), were sufficient to show that said two tracts were covered by the foreclosure decrees, and that as the District Judge took the same view and rendered judgment in their favor for both of said tracts (Record, pp. 47–48), the plaintiffs in error had no occasion to complain of the verdict, or to move to set it aside, or to move for a new trial, so far as those two tracts were concerned. They did move for a new trial as to the rest of the land (Record, pp. 58–60), but that is immaterial, since we are not complaining now of the judgment of the State Court in that respect; and we agree that only the Hughes & Slaughter tract and the Mayes tract are involved now.

(2) It may be true that whether the issues of fact arising in a case shall be submitted to the jury on special issues or under instructions to return a general verdict is a matter resting in the discretion of the trial judge. But that consideration is not material here, since there were no *issues of fact* to be submitted to a jury in any form, because the evidence is entirely free from conflict. It is a well-settled rule of law in Texas, as we presume it is everywhere, that the trial judge is not authorized to submit to the jury by

special issues or otherwise any question not made by the evidence in the case; and that where the evidence is free from conflict, it is the duty of the judge to decide the case thus made according to law without reference to a jury. The foreclosure decrees of the Federal Court were in evidence and the facts respecting the use of the two tracts of land in controversy and the purpose for which they had been acquired being without any conflict, the plaintiffs in error, upon the conclusion of the evidence, requested the peremptory instructions embraced in special charges 8, 9, 10, 11 and 12 (Record, pp. 34–36). This was certainly sufficient to present their contention and to preserve their rights, and if the decrees did embrace the property such charges should have been given. It was wholly immaterial, so far as the federal rights of plaintiffs in error were concerned, that the trial judge concluded to submit special issues to the jury when such rights had been asserted by them in due form and time. If complaint at the action of the court submitting the case upon special issues be necessary, as seems to be contended by counsel for the defendants in error, then we ask what other complaint could be required or expected

than a request in due form to instruct the jury peremptorily to return a verdict, because of certain uncontroverted facts? But, as already stated, we really had no occasion to complain of the action of the court in submitting special issues so far as the Hughes & Slaughter tract and the Mayes tract are concerned, when he instructed the jury peremptorily to find certain undisputed facts, which entitled the plaintiffs in error to both of those tracts, as the trial judge himself held, when he came to enter judgment.

ONLY THE HUGHES & SLAUGHTER TRACT AND THE MAYES TRACT NOW INVOLVED.

In subdivision "E" of their brief (pp. 31–35), the defendants in error in support of their motion to dismiss the writ of error, contend that the plaintiffs in error have abandoned their complaint of the judgment of the District Court, with respect to what the defendants in error designate as the "bonus lands." That is correct; such lands have never been used and are so situated that they are not capable of use in connection with the operation of the railroad, and of course were not acquired for such use. If the action of the defendants in error in the State Court had

been limited to such lands, this controversy would have terminated long ago. We defended as to them, however, not so much upon the strength of our own title as because of what we deemed the insufficiency of the title of the defendants in error who being plaintiffs in the State Court were required to recover, if at all, upon the strength of their own title. It was held sufficient, however, by the State Courts, and, that being a question of local law, we have not brought it to this Court. But as to the Hughes & Slaughter tract and the Mayes tract we contend, and have contended throughout the proceeding, that they were embraced by the foreclosure decrees of the Federal Court through which we claim, and that such decrees were effectual to deprive the Texas Trunk Railroad Company, under which the defendants in error also claim, of all title and to vest the same in us.

THE FEDERAL RIGHTS WERE ASSERTED IN DUE TIME AND FORM AND WERE PRESERVED THROUGHOUT THE PROCEEDINGS IN THE STATE COURTS.

The statutes of Texas governing the action of trespass to try titles provide that a defendant in

the action may file only the plea of "not guilty;" and Article 5,257, R. S. Tex. 1895, reads as follows:

> "Under such plea of 'not guilty' the defendant may give in evidence any lawful defense to the action, except the defense of limitation which shall be specially pleaded."

And it has been held, that, if nevertheless a defendant should specially plead any defense other than that of limitation, he is limited to the defense thus specially pleaded. Consequently the answer of the defendants in the case at bar was limited to pleas of limitation and of "not guilty" (Record, pp. 7–10). It was deemed safer to assert the federal rights relied upon during the progress of the trial rather than limit the effect of the plea of "not guilty" by specially pleading it in the answer (*Chicago, &c., R. Co.* v. *Chicago*, 166 U. S., 226, 231). When the foreclosure decrees of the Federal Court (Record, pp. 152–165) were offered in evidence upon the trial in the District Court, the plaintiffs in error "in connection with the offer of said testimony" stated that their "contention was that the effect of said proceedings was to pass the title to the property involved in

this suit to the purchasers at said sale and that to give due effect to said foreclosure and sale and confirmation, it is required that the Court should hold that the property involved in this suit passed to the purchasers at such sale" (Record, pp. 151–152).

Then, upon the conclusion of the evidence and in due form and time, the plaintiffs in error again specially set up and asserted the federal right by special charges 8, 9, 10, 11 and 12 requested by them and set forth in the record, pages 34–37. Under the Texas practice, if a special charge is broader than it should be, its refusal is not error, although it may be correct in some part. Special charges 8 and 9 were intended to apply to all the land in controversy, including the Hughes & Slaughter tract and the Mayes tract. But in view of the rule of practice just stated, it was deemed safer to request special charges 10 and 11 applying only to those two tracts. The refusal of such special charges was made the basis of the 10th, 11th, 20th, 21st and 22d assignments of error to the Court of Civil Appeals. The Court refused to sustain the assignments; and the record shows that application was made to the State Supreme Court for a

writ of error and was denied (Record, p. 227), and while the record does not contain a copy of the petition to that Court for a writ of error, since such petition is a record of the Supreme Court and not of the Court of Civil Appeals, yet, if it is necessary to indulge presumptions at all, it should be presumed that the application to the State Supreme Court was based upon the errors assigned in the Court of Civil Appeals.

POWER OF THIS COURT TO EXAMINE THE FACTS.

It is urged in the briefs of Defendants in Error, and was strenuously argued by their counsel at the bar, that this Court is without power to review the judgment of the Court below, because it involves consideration of the facts. And yet it is not claimed that there is any conflict in the evidence, but on the contrary, it was admitted at the bar that the evidence is entirely free from conflict. Counsel on both sides agree in this view of the evidence. The evidence has been brought up in the record in conformity with the Texas practice, in what is denominated in that State as the "Statement of Facts," and is obviously free from conflict. Now we endeavored to show in our original brief filed in this Court

(pages 29–58) that in such circumstances this Court clearly and of necessity has the power to examine the facts, and determine whether or not, in view of them, the judgment of the State Court has denied to the foreclosure decrees of the Federal Court the effect to which they are by law entitled; and we need not reiterate what is there stated.

But counsel for defendants in error have much to say about "ultimate facts" and "evidential facts," and contend that this Court can consider only the "ultimate facts" as found by the jury and by the Court below. The only definition of these phrases as used by opposing counsel seems to be that such findings or facts as appear to be in favor of defendants in error are "ultimate facts," while such as are in favor of plaintiffs in error are only "evidential facts."

But the distinction between "ultimate facts" and "evidential facts" is academic so far as this case is concerned. The question before the Court is whether the decrees in the Federal Court in the foreclosure proceedings embraced the two tracts in controversy. The decrees speak for themselves, of course, and the *facts* respecting the occupation of the property by the main tracks of

the railroad and its use for other railroad purposes and respecting the intention of the company in acquiring the property are without dispute. Such facts are, we submit, the "ultimate facts" in the case if it be deemed necessary to particularly characterize them, and are indisputably established by the evidence and by the verdict of the jury which we shall next proceed to consider.

The verdict.

Counsel for the defendants in error in his brief and argument has ignored so much of the verdict of the jury relating to the two tracts in controversy as was returned in obedience to the instructions of the Court (Record, 18–19) and proceeds as though the findings in response to the special issues framed by counsel for defendants in error (plaintiffs below) were the only findings in the case. Such assumption is of course unwarranted. We submit that the findings returned in response to the instructions of the Court covered all the material or "ultimate" facts in the case. Finding (2) (Record, 18) with reference to the Hughes & Slaughter tract was (1) that when that tract was bought "it was

the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the railroad and whatever switches and side tracks should be necessary in the operation of the road," (2) that if all of it should not be needed then the rest should be sold to the employes of the Company, (3) that no such sales had ever been made nor had any part of the land been subdivided into lots, (4) that the main track of the railroad had been constructed across the land near its western boundary, (5) that side tracks were constructed upon the land and a "Y" was constructed near the center of it and extending eastwardly across the land, (6) that a ticket office and car shed was constructed upon the land, (7) that such improvements were used in the operation of the road up to 1892, (8) that the company never owned any other land in the city of Dallas which was the terminus of its line, (9) that as originally contemplated and as actually constructed the road, if properly operated, would need as much as twenty-five acres for terminal facilities, etc.

All these findings were established by the undisputed evidence in the case, and while the Judge finally consented to submit the case on special

issues as urged by counsel for defendants in error, yet with reference to these uncontroverted facts, he directed the jury what their findings should be. We submit that the facts show beyond controversy that the property was covered by the mortgage which counsel for defendants in error concede embraced (1) property actually *used* for railroad purposes *or* (2) property *intended* for railroad purposes. Substantially the same facts were found in finding 3 (Record 19) with reference to the Mayes tract, except that the Judge did of his own motion submit to the jury with reference to that particular tract questions 3*a* and 3*b*, as to whether the property was really "necessary" to the operation of the road. But that is not material, since if it were *actually used*, or if it were *intended*, for railroad purposes, it is sufficient to bring it within the mortgage whether absolutely "necessary" or not.

It is such findings as the above, based upon the undisputed evidence and having the sanction of the trial Judge which counsel for defendants in error are pleased to term "evidential facts." He does not, as we understand, dispute their truth, but ignores them as immaterial, though he does indeed, considering and discussing other

findings of the jury upon his own issues, assume positions inconsistent with these facts.

Let us proceed now to consider, but in the briefest possible manner, the findings of the jury upon the special issues prepared by, and submitted at the request of, counsel for defendants in error.

The fourth and fifth (Record 19 and 20) to the effect that *all* of the Hughes and Slaughter tract was purchased by the Railroad Company for the purpose of subdividing the same into lots and selling the same to employes of the company, are not only inconsistent with finding (2) directed by the Court, but are absolutely contrary to the only evidence in the case upon that point. The only evidence outside of the circumstances of its use showing the intention of the company in purchasing the property, was that of W. L. Cabell (Record 131–132) who testified positively that it was bought for railroad purposes but that if all should not be *needed* for such purposes the surplus should be divided into lots, etc., though "*all that was necessary for tracks and switches was to be used for that purpose;*" and the evidence W. H. Gaston (138–139). The testimony of plaintiff's witness Johnson

(127–128) as well as of the witness Whyte (141–142) which was uncontroverted, showed that all of the tract was indeed "*needed*" for railroad purposes.

The sixth finding (Record, 20) to the effect that no part of the tract was used by the company in the operation of its road at the date of the execution of the International Trust Company mortgage is probably true, since that mortgage was dated March 22, 1880, while the deed to the property was not executed until March 13, nine days before, and was not delivered until September following. Obviously such issue is immaterial.

It will be observed that special issues seventh and eighth were ingeniously framed so as to ask whether the "Y" existed, upon the very days when the mortgages were respectively executed; and the jury answered the question literally. It is of course wholly immaterial whether the "Y" actually existed upon the *very day* of the execution of either of the mortgages. It is quite likely that it did not exist on March 22, 1880, when the International Trust Company mortgage was executed, since the deed conveying the property to the company was executed but nine days before.

But it is perfectly clear from the record that the Y did exist and was actually used in the operation of the road up to March, 1892, when it was removed by William Whyte, then superintendent for Receiver Atkins, appointed in the proceedings for the foreclosure of the Central Trust Company mortgage. Whyte became connected with the property upon appointment of that receiver in September, 1891, and testified as follows (Record, folio 141–142):

> "When I first became connected with the road there was a small depot on the 25-acre tract, I think 12 by 14, not now in existence. There was a sand house for drying sand and a blacksmith shop and an oil and waste house and some small temporary buildings. I don't remember now the extent of them; we used these improvements at that time. That is all I had to do with when I started. *We used that land as our terminal up to February, 1892*, when we connected with the H. & T. C. * * * * My recollection is that there was a complete Y on the property when I took charge. A Y has two curves and a stem. I cannot well locate on the map the other leg of the Y because the leg of the Y on the map is

not located to suit; it was farther south. The stem of the Y was 75 or 100 feet long, as well as I recollect. Both prongs of the Y connected with the main track of the Texas Trunk. I guess that the stem of the Y terminated about 150 feet from the northeast boundary of the 25 acres. *I took that Y up. I used it about four months before it was taken up. I think I took it up in March, 1892, after I commenced running to the H. & T. C. terminals.*"

The ninth special finding (Record, 21) is obviously immaterial, since the lien of the mortgage attached, if at all, upon its execution in 1888.

The tenth special issue (Record, 21) is not only contrary to special finding 2 (Record, 18), but is plainly contrary to the uncontroverted facts which are that the main track of the railroad at least has always been and is still upon the twenty-five-acre tract, and that it was extensively used and occupied in other ways in connection with the operation of the railroad.

Findings 11th, 12th, 13th and 14th are plainly in conflict with finding 2 (Record, 18), and also with the uncontroverted evidence in the case; and they never should have been submitted.

Not only the physical facts shown by the construction of the main track across the property, as appears from the map (Record, 124), but also the testimony of defendants' in error own witnesses show such findings to be untrue. The testimony is quoted and discussed in our original brief, pages 62–68.

The answers to the 16th and 17th special issues (Record, 22–23) are the same in effect as the answers to the 7th and 8th, which we have just discussed.

The answer to the 18th shows that the stem of the "Y" approached to within 275 feet of the northeasterly boundary of the tract, which is 125 feet further from the boundary than it was placed by the witnesses Johnson and Whyte who alone testified on the subject. By reference to the map (Record, 124), it seems likely that the jury answered this question by approximating the space between the northeasterly boundary and the arm of the "Y" shown upon the map, which was obviously incorrect since it ignores the stem that at one time existed, but which is not shown on the map.

The 19th finding is to the effect that when the Hughes and Slaughter tract was acquired it

was the intention also to acquire and use the "flat iron" tract—a proposition which it is unnecessary for us to controvert, though as a matter of fact the "flat iron" tract was never acquired in any form; and its purchase as a *substitute* for the Hughes & Slaughter tract was never even contemplated, but it was desired as *additional* terminal grounds and really to fill out the former tract.

We therefore submit that practically all the special issues prepared by and submitted at the request of counsel for defendants in error are immaterial, and that if there be any "evidential findings" in the record, they are presented by the special issues prepared by defendants in error's counsel, and not by special findings (2) and (3) returned in response to the Court's instructions. Such of the findings upon which the defendants in error rely as are not immaterial are not only inconsistent with the findings (2) and (3) directed by the Court, but are also palpably contrary to the undisputed evidence.

But counsel for defendants in error devote much space in their brief (pp. 24–31) and in their supplemental brief and also gave much time in the oral argument, to the proposition that under the

Texas statute, the verdict of a jury is conclusive upon the facts found; and also that this is true whether the verdict is unsupported by the evidence or not. This proposition needs to be divided. The verdict is undoubtedly "conclusive as to the facts found," and it is so provided by Article 1332 of the Texas statutes, but this is true only when the evidence is conflicting, and there is thus presented an *issue of fact* to be determined by the jury. It was never contemplated by the statute that a special *issue* would be submitted to a jury when there was no evidence presenting any such *issue* or to support it if found as a fact. It is settled by repeated decisions of the Supreme Court of Texas that it is reversible error for a trial judge to submit to the jury an issue not called for by the evidence.

As to the other division of the proposition to the effect that the finding is conclusive although without support in the evidence, we dissent absolutely. It is no more the law in Texas than in any other civilized community that a jury verdict against the uncontroverted evidence is binding upon any one. All the Supreme Court of Texas decided in *Ablowich v. Bank*, 67 *S. W. Reptr.* 79, and *Waller v. Liles*, 70 *S. W. Reptr.* 17, was,

that after a trial judge submits a case to a jury, he cannot then, when the verdict returned does not meet his approval, ignore the verdict and proceed to render judgment in conflict therewith. It is his duty in such case to set the verdict aside and try the case again. Where, however, the case is submitted on special issues, if the answers returned by the jury embrace the material facts, the Court certainly is not precluded from rendering judgment consistent with such facts, regardless of any findings upon any mere immaterial issues that do not control.

Here we submit the material facts were found in findings 2 and 3 (Record, pp. 18–19), and being also established by the uncontroverted evidence, it was the duty of the Court to render judgment accordingly without regard to the irrelevant and immaterial issues prepared by and submitted at the request of counsel for the Defendants in Error.

But the most that can be claimed by the defendants in error with any reason at all, for the findings upon the special issues prepared by their counsel is, that they are inconsistent with the findings returned in response to the directions of the Court. In that view, the case presents con-

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tradictory findings by the jury. Then what? Are the plaintiffs in error to be deprived of their Federal rights by the irregular proceeding adopted and followed by the State Courts. They strictly conformed to the requirements of the State Court practice in asserting their rights. We have seen that they claimed the protection of the Federal Court decrees when such decrees were offered in evidence; and in due form and time they requested suitable instructions of the trial Court, which, if given, would have resulted in a verdict and judgment in their favor, based upon the efficacy of the Federal Court foreclosure decrees. They could not prevent the State Court from submitting special and inconsistent issues to the jury. They had exhausted their remedy in the trial Court and they carried the points in due form to the Court of Civil Appeals. That Court did not see proper to remand the case for a new trial on account of the conflicting issues, if there be any conflict, but proceeded to ignore, practically, findings 2 and 3 and to reverse the District Court and render judgment for defendants in error, thus apparently taking the view urged by counsel for the defendants in error, that the material and "ultimate" facts

found in findings (2) and (3) were merely and only "evidential facts." It is not seriously claimed that plaintiffs in error were in any wise derelict. There is certainly no reasonable room for any such claim.

Since the Court of Civil Appeals deemed the verdict sufficient, to admit of a judgment without remanding the case on account of any conflicting findings, we submit that it is too late for the defendants in error to put forward any such claim in this Court. Indeed they do not exactly contend that the findings are inconsistent, but in their printed and oral arguments dispose of findings (2) and (3) by terming them at one time merely "evidential facts," and at another as "surplusage." Just why those findings should be of any less dignity than the others, or just why they are to be superseded by other findings in case of conflict, we are left to wonder. There does not seem to be any real or serious dispute that the facts covered by them are more material and more controlling in the decision of the case than those embraced in any of the other findings. The circumstance, too, that they were framed and submitted by the trial judge of his own motion, and as embodying what he

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conceived to be the material issues established by the uncontroverted evidence would seem to entitle such findings to as much rank and dignity as the findings returned in response to the special issues prepared by counsel for the Defendants in Error.

But more important still, findings (2) and (3) are based upon the uncontroverted and indisputable evidence. This is not really disputed, but is rather evaded by the defendants in error. Now in case of conflict in the findings of a jury, if there is deemed to be any conflict in this case, ought not the findings based upon the uncontroverted evidence and supported by the approval also of the trial judge be adopted by this Court rather than the findings which are clearly and unmistakably opposed to and without support whatever in the evidence?

In other words, which is to prevail in case of a conflict—the findings supported by the undisputed evidence in the case, or the findings which are not only without, but are directly opposed to the evidence?

R. S. LOVETT,
MAXWELL EVARTS,
Counsel for Plaintiffs in Error.

No. 137.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

EDWARD H. PARDEE and ARABELLA D. HUNTINGTON, Executrix, and CHARLES H. TWEED and ISAAC E. GATES, Executors, of COLLIS P. HUNTINGTON, Deceased, *Plaintiffs in Error,*

vs.

A. D. ALDRIDGE, A. F. HARDIE and W. G. MOWRY, Trustees for J. E. DOWNES and Associates, *Defendants in Error.*

BRIEF OF ARGUMENT FOR DEFENDANTS IN ERROR.

W. J. MORONEY,

Counsel for Defendants in Error.

STATEMENT OF THE CASE.

(References are to Printed Record.)

Not having been furnished a copy of brief for plaintiffs in error, we deem it proper to make the following preliminary statement of the case:

On May 21, 1898, A. D. Aldridge, A. F. Hardie and W. G. Mowry, suing as trustees of the legal title for J. E. Downes and Associates, creditors of the Texas Trunk Railroad Company, as variously organized, brought suit of "trespass to try title," in the District Court of Dallas County, Texas, against Edward H. Pardee and Collis P. Huntington, to recover judgment for title and possessions of certain lands described in

plaintiffs' petition, which had formerly been owned by said Texas Trunk Railroad Company, hereinafter for brevity designated "Railroad Company." These lands may for convenience and clearness be divided into two classes:

First—A tract of 25 acres in the City of Dallas, conveyed to the Railroad Company by Hughes & Slaughter by deed bearing date March 13, 1880, and commonly designated in the record as the "Hughes & Slaughter tract," and a tract of 11.92 acres, adjoining the City of Dallas, conveyed to the Railroad Company by S. R. Mays and wife by deed bearing date February 2, 1881, and commonly designated in the record as the "Mays tract," there being excepted from both tracts a railroad right of way 100 feet wide, as to which plaintiffs disclaimed ownership. (R p. 150.) These two tracts will for convenience be designated as the "Dallas lands."

Second—Sundry rural tracts in Dallas, Kaufman and Houston Counties, Texas, and sundry town lots in the towns of Kaufman, Kemp and Crandall, which had been conveyed to the Railroad Company as variously organized, by sundry persons and on various dates, as a "bonus" to induce the construction and extension of the railroad. All these tracts will for convenience be collectively designated as the "bonus lands."

On the trial the court peremptorily instructed the jury to find for plaintiffs as to the "bonus lands," and there was verdict and judgment accordingly. (R. pp. 17, 18, 40.)

As to the "Dallas lands," the court submitted certain special issues to the jury, which were duly answered, the court peremptorily directing the answers to several of these issues. (R. pp. 18-24.)

Both plaintiffs and defendants moved for judgment, (R. pp. 39, 40), whereupon, on July 25, 1899, judgment was rendered for plaintiffs as to the "bonus lands," and for defendants as to the "Dallas lands." (R. pp. 40-53.) Both plaintiffs and defendants appealed to the Court of Civil Appeals, Fifth Supreme Judicial District of Texas. On June 30, 1900, the Court of Civil Appeals rendered judgment af-

firming the judgment of the district court in favor plaintiffs as to the "bonus lands," and reversing the judgment of the district court as to the "Dallas lands," and rendering judgment thereof in favor of plaintiffs. (R. p. 210.) Defendants filed a motion for rehearing, (R. p. 211), which was overruled, (R. p. 227), whereupon defendants presented to the Supreme Court of Texas a petition for writ of error, which was denied on January 24, 1902. (R. p. 227.) This petition for writ of error is not in the record, and it therefore does not appear upon what grounds a writ of error was prayed, or that any Federal questions were raised in the petition.

Defendant Collis P. Huntington having died, his executrix and executors were made parties and joined with defendants Edward H. Pardee in applying for a writ of error from the United States Supreme Court to the Court of Civil Appeals, which writ was allowed by the Chief Justice of said Court of Civil Appeals on June 21, 1901, (R. p. 230), and a transcript of the record, together with the writ of error and assignment of errors, was filed in the Supreme Court of the United States on July 17, 1901. (R. p. 245.)

The assignments of error, by which it is sought to present certain Federal questions, are based upon the contention that the Court of Civil Appeals failed and refused to give proper effect to certain decrees and foreclosure sales in the United States Circuit Court for the Northern District of Texas, upon which plaintiffs in error relied as muniments of title. (R. pp. 231-233.)

In order to determine the bearing of these assignments, it becomes necessary to present a statement of the history of the title to the lands in controversy, omitting all matters that throw no light on the questions now presented.

Most of the material facts were embraced in a written agreement, found in the printed record, pages 75 to 124, inclusive. In addition to this agreement, testimony was introduced on the question whether or not the property in controversy, or any of it, was actually acquired or used for railroad purposes. From this agreed statement, and the

special findings of the jury on the question of the purpose for which the property was used and acquired, we make the following statement:

STATEMENT OF THE TITLE.

(1) The Texas Trunk Railroad Company was incorporated under the laws of the State of Texas, on November 6, 1879. (R. p. 76.)

(2) On March 22, 1880, the Railroad Company executed to the International Trust Company, as trustee, a mortgage on its railroad, etc., describing the mortgaged property as follows:

"All and singular the railroad of the party of the first part, as the same now is or may hereafter be constructed from its terminus, in or near the City of Dallas and State of Texas, southeastwardly through the counties of Dallas, Kaufman, Henderson, Anderson, Cherokee, Angelina, Tyler, Hardin and Jefferson, to the Gulf Coast, at or near Sabine Pass, together with a branch from some point on the main line, to, and through the counties of Jasper and Newton, to the boundary line between the States of Texas and Louisiana, in all a distance of about three hundred and fifty miles, including the right of way, roadbed, superstructure, iron, ties, splices, chairs, bolts, nuts, spikes, all lands and depot grounds, station-houses and depots, viaducts, bridges, timber and materials and property purchased and to be purchased for the construction and equipment of said road; all the locomotives and cars, and machinery, and all kinds of rolling stock, whether now owned or hereafter to be purchased by the said party of the first part, together with all machine shops, tools, implements and personal property used therein, or upon, or along the lines of said railroad, or at its stations, or any of them, including all appurtenances and appendages of said railroad, and the property of said company now acquired or which may be acquired, in the State of Texas, used for and pertaining to the operation of said railroad; also all the right, title and interest which the said party of the first part now has or may hereafter acquire in and to a certain portion of the lands granted to said party of the first part, by the laws of the State of Texas in such cases made and provided; that is to say, fourteen sections out of sixteen

sections per mile for each and every mile of road constructed and to be constructed, amounting in the aggregate to four thousand and nine hundred sections of six hundred and forty acres each, or three million, one hundred and thirty-six thousand (3,136,000) acres of land, which said lands are to be selected in the manner hereinafter provided." (R. pp. 79, 80.)

(3) The "Hughes & Slaughter tract," now in the City of Dallas, was conveyed to the Railroad Company by deed bearing date March 13, 1880, prior to the execution of the mortgage, (R. pp. 2, 75, 76), but which was not actually delivered until the following September, subsequent to the execution of the mortgage. (R. pp. 131, 204.) At this time the land was outside the city limits, but subsequently, in 1889, the city limits were extended so as to include it. (R. pp. 128, 204.)

(4) The "Mays tract," near, but then and now outside the City of Dallas, was conveyed to the Railroad Company February 2, 1881, subsequent to the execution of the mortgage. (R. pp. 3, 75, 76.)

(5) The "bonus lands" were conveyed to the Railroad Company on various dates from March 3, 1880, to June 14, 1886. As will subsequently appear, the Railroad Company has had three successive organizations under its original charter, each organization constituting under the railroad laws of Texas a separate and distinct corporation. The first corporation was formed, as stated, on November 6, 1879, (R. p. 76); the second on June 15, 1883, (R. p. 84); and the third on November 3, 1886, (R. p. 89.) It is important to note, as will appear from the dates of the deeds. (R. pp. 2-7, 75), that some of these "bonus lands" were acquired by the first company, some by the second, and some by the third.

(6) It was agreed that "all the lands in controversy were deeded to the Texas Trunk Railroad Company by the respective grantors and by deed bearing the respective dates set forth in plaintiff's first amended original petition, * * * and said deeds are the agreed common source of title to the respective tracts therein described." (R. pp. 75, 76.)

It thus appears that each of the three Companies was the common source of title to a part of the lands in controversy, a fact having an important bearing on the questions arising in this case, as will hereafter appear.

(7) Plaintiffs claimed title under sundry deeds, judgments, etc., in favor of creditors of the Railroad Companies, but as no Federal question is sought to be raised on plaintiff's chain of title, and the state courts have established its validity, it is not deemed necessary to set it out here. So far as necessary for the consideration of the questions now involved, the links in plaintiffs' chain of title will be hereinafter pointed out.

(8) The International Trust Company mortgage was foreclosed by decree of the United States Circuit Court for the Northern District of Texas, rendered on January 31, 1883, and the property described in the decree was sold to M. F. Dickinson and associates, and the sale was confirmed on June 6, 1883. On June 15, 1883, the purchasers reorganized under the same name, "Texas Trunk Railroad Company," thus constituting the second corporation of that name, and on June 19, 1883, under order of said court, the property sold was delivered to the second Company, which for purposes of distinction is designated in the record as "Texas Trunk Railroad Company No. 2," the previous and first organization being called No. 1. (R. pp. 82-85.) The decrees of foreclosure and confirmation described the property substantially the same as in the mortgage, no more particular description being attempted. (R. pp. 82-85.) No question arose in this case as to the validity of these foreclosure proceedings; but the important question did arise, whether or not the lands now in controversy, or any of them, were included in the language of description contained in the mortgage and decrees. It is indisputable that some of the lands were not included, because the foreclosure was against the first Company, and some of the property was acquired subsequent to these proceedings, by the second and third Companies, and therefore could not have been included. As we will undertake to show, it was substantially

admitted by plaintiffs in error, in the Court of Civil Appeals, that the description was not sufficient to embrace any of the "bonus lands," and that plaintiffs in error had no title to these lands. On this point the Court of Civil Appeals says: "It is not seriously contended by defendants that the lands in Dallas, Houston and Kaufman Counties, and for which plaintiffs recovered judgment, were embraced. The contention arises over the Hughes & Slaughter tract and the Mays tract." (R. p. 204.) This statement is made to show that in the Court of Civil Appeals plaintiffs in error in effect waived and abandoned any Federal question affecting the "bonus lands," and we will undertake to show that this was, in effect, a waiver of any Federal question as to the Hughes & Slaughter and Mays Tracts, otherwise designated as the "Dallas lands."

(9) On May 18, 1885, a judgment for $149,102.76 was rendered by the District Court of Dallas County, Texas, in favor of E. M. Reardon, against the second Company, or "Texas Trunk Railroad Company No. 2." On June 9, 1885, an execution issued on this judgment to Dallas County, and was levied on the following described property:

"The railroad of the Texas Trunk Railroad Company, including the entire road-bed, track, depots and depot grounds, offices and shops and right of way, appurtenances and the franchises and all other charter powers and privileges of the Texas Trunk Railroad Company, its initial terminus being near the City of Dallas, and its principal office situated in Dallas County, Texas." The levy was also made by proper description of the Hughes & Slaughter and Mays tracts of land, and on certain personal property. On July 7, 1885, the property as levied upon was sold by the sheriff to J. E. Schneider and associates for $119,320, and deed duly executed. On July 13, 1885, under an *alias* execution to Kaufman County, the Kaufman County lands involved in this suit were also sold to J. E. Schneider and associates for $970.

On October 6, 1885, under an execution issued on a decree of the United States Circuit Court, establishing certain claims against the first Company in the original International Trust Company suit, the

marshal sold to said J. E. Schneider and associates property described as follows: "The entire railroad, road-bed, depots, depot grounds, offices, shops, track, iron rails, bolts, ets., and all other property of every other description thereunto belonging from its terminus at or near the City of Dallas to its terminus in Kaufman County, together with the entire right of way, franchises and charter privileges of the Texas Trunk Railroad Company, the said railroad lying and being in the counties of Dallas and Kaufman, and its principal public office being in Dallas County." On November 13, 1885, the purchasers, J. E. Schneider and associates, claiming title under the above three sales to them, reorganized the Company under the same name, thus constituting what is designated in the record as "Texas Trunk Railroad Company No. 3." (R. pp. 86-89.) It was agreed that "the proceedings were sufficient to vest in this (third) Company the title to all property acquired by the purchasing trustees under the three sales above mentioned." (R. p. 89.) There was no agreement as to what property was actually acquired by the purchasing trustees. It is conceded and not disputed that the purchasing trustees thereby acquired the road-bed, tracks, franchises and charter powers and privileges of the Railroad Company, and that on reorganization these rights and properties passed to the third Company. Defendants in error contend that none of the lands now in controversy were actually acquired by the purchasing trustees, and such is the effect of the judgment of the state courts. Shortly stated, the marshal's sale did not pass title to any of these lands, because it did not describe them. This, we understand, is not disputed. The execution sale to Dallas County, on the Reardon judgment, did not pass title to the Hughes & Slaught and Mays tracts, because the judgment and execution were against the second Company, and, as held by the state courts, these lands were never acquired by the second Company, not having been included in the International Trust Company mortgage and foreclosure sale, and having been originally purchased by the first Company. The same is true of all the Kaufman County lands originally purchased by the

first Company that were sold under the execution on the Reardon judgment against the second Company. In addition, the Kaufman County sale was absolutely void, because the effect of the previous Dallas County sale on the Reardon judgment was, under the Texas railroad statutes, to dissolve the second corporation and pass its chartered rights to the purchasers, and therefore no valid execution sale could be made against it, although unsold assets may have remained. This is the effect of the opinion of the Court of Civil Appeals in construing the Texas railroad statutes, and we understand that the correctness of this construction is not questioned. At any rate, it is not a Federal question.

(10) On August 30, 1888, the Texas Trunk Railroad Company (No. 3) executed to the Central Trust Company as trustee a mortgage on its railroad, etc., describing the mortgaged property as follows: "The railroad already constructed and to be constructed, of the party of the first part, situated in the counties of Dallas and Kaufman, in the State of Texas, extending from the City of Dallas in said county of Dallas, to Cedar Station, in said county of Kaufman, consisting of a main line upwards of fifty miles in length, and also all the rights of way, track, side-tracks, ties, rails, culverts, bridges, stations, water stations, machine shops, structures, rolling stock, locomotives, cars, tenders, machinery, implements, iron, materials, lands, tenements and other property pertaining to said railroad, owned or to be owned by party of the first part, or used or acquired or to be used or acquired by said party of the first part in and for the construction, repairs, renewal, improvements, completions, operation or management of said railroad, and together with the chartered and corporate rights, privileges and franchises now possessed or which shall hereafter be acquired by the party of the first part, including the franchise to be a corporation, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in any wise appertaining, and the reversion, remainders, tolls, incomes, rents, issues and profits thereof, and also all the rights, estate, title, interest, property, possession, claim

and demand whatsoever, as well as in law, as in equity, or otherwise howsoever, of the said party of the first part, of, in and to the same and every part thereof." (R. p. 89.)

(11) On September 25, 1889, the State of Texas, by its attorney general, filed an information in the nature of a *quo warranto* in the District Court of Dallas County, against the Texas Trunk Railroad Company, as then organized, for the purpose of having declared forfeited the charter and franchises of the Company. On October 23, 1889, on motion of defendant, the venue was changed to Ellis County. On September 14, 1891, a final judgment was rendered declaring a forfeiture of the Company's charter, dissolution of the corporation, and appointing John H. Gaston receiver of all the Company's property. On appeal by defendant this judgment was affirmed by the supreme court, January 15, 1892. The order appointing Gaston as receiver authorized and directed him to take possession of all the property of the Railroad Company owned at the institution of this suit, or at any time since. Gaston at once qualified as receiver, and he is still acting in that capacity, the receivership never having been closed. However, he did not obtain possession of the property described in the Central Trust Company mortgage above mentioned, the same being in possession of a receiver of the United States court, as will hereinafter more fully appear. (R. p. 91.)

(12) On September 7, 1891, the Central Trust Company brought suit in the United States Circuit Court, Northern District of Texas, against the third Company, to foreclose the Central Trust Company mortgage as above mentioned, and Charles Dillingham was appointed receiver of the mortgaged property. This was seven days prior to the final judgment in the *quo warranto* suit above mentioned. (R. pp. 94, 95.) On December 3, 1892, Dillingham having resigned as receiver, George T. Atkins was appointed to succeed him. (R. p. 97.)

In the mean time, the corporation having been dissolved by decree of the court, as above stated, such proceedings were had that on July 9, 1894, the foreclosure suit in the Central Trust Company mortgage

was revived against John H. Gaston, the receiver appointed in the *quo warranto* suit, and he was substituted for the Railroad Company as defendant. (R. pp. 97, 98.) The situation then was as follows: Atkins, the Federal court receiver, was in possession, as receiver, of so much of the property of the third Company as was in fact embraced in the Central Trust Company mortgage, and no more. The state court receiver disputed the legality of this possession, (R. pp. 97, 98), but that question did not arise in this case, as plaintiffs below did not deem it necessary to raise it, and the possession of the Federal court receiver, so far as the mortgaged property was concerned, may be assumed to have been legal, for the purposes of this case. The Federal court did not undertake to appoint a receiver of *all* the property of the Company. The order was limited to the mortgaged property. (R. pp. 94, 95.) The state receiver, upon dissolution of the corporation, became vested, under the Texas statutes, with the legal title to *all* the property of the third Company, embracing the legal title to the mortgaged property, subject to the mortgage, and the absolute legal title to all property, if any, not included in the mortgage, of course holding the legal title as trustee for creditors and stockholders, and subject to administration under order of court. This statement of the then status of affairs, is, we understand, not disputed.

(13) It now becomes necessary to trace the history of certain collateral matters which become the subject of question in this case. Prior to the dissolution of the first Company by the foreclosure sale under the International Trust Company mortgage, a number of judgments had been rendered in favor of W. B. Nason and others, against the Company, in various state courts. On August 28, 1886, executions which had been issued on these judgments were levied by the sheriff of Dallas County on the Hughes & Slaughter and Mays tracts of land, by specific description, and also on "the entire road-bed, track, railroad, depots, depot grounds, offices and appurtenances from the City of Dallas in the county of Dallas, to the town of Kaufman, Kaufman County, of the Texas Trunk Railroad Company, as constructed in 1882.

Also upon the right of way, franchises, land grant, and all charter rights and privileges of said Company as existing in 1882." On October 5, 1886, the property so levied upon was sold by the sheriff to E. M. Powell and associates, and deed was executed on October 7, 1886. (R. pp. 106-111.) This instrument is commonly designated in the record as the "Powell deed."

On January 13, 1894, Geo. T. Atkins, receiver in the Central Trust Company foreclosure suit, filed a bill in equity in the United States Circuit Court at Dallas against Powell and associates, to cancel the Powell deed. Among other things, complainant alleged that all the property embraced in the Powell deed was embraced in the International Trust Company mortgage and foreclosure sale; that through the subsequent proceedings heretofore mentioned, all said property became vested in the reorganization of the Railroad Company, and in the Company that executed the Central Trust Company mortgage; that the judgments in favor of Nason and others under which the Powell sale was made, were all moneyed judgments without lien against the first Company; that some of said judgments had been paid and others had become dormant before the Powell sale; that the Powell sale was void, because prior thereto the first Company had become dissolved as a corporation through the International Trust Company sale; that none of said judgments had been revived against the trustees of the sold-out Company; that said Powell sale was fraudulent in fact; that the consideration was grossly inadequate; that the executions were issued and the sale was made without the authority of the plaintiffs in said judgments; that the amount bid was not in fact paid by Powell and associates. Complainant prayed for a cancellation of the Powell deed for the benefit of those represented by complainant as creditors, stockholders or otherwise. (R. p. 112.)

On July 16, 1895, a final decree was rendered, cancelling the Powell deed, as prayed for. Subsequently, at a date not definitely stated, Powell and associates executed to Edward H. Pardee a deed purporting to convey all right, title and interest that Powell and as-

sociates acquired by said sale. (R. pp. 106-114.)

(14) On February 26, 1895, the Central Trust Company mortgage was foreclosed by decree of the Federal court, and on August 27, 1895, the mortgaged property was sold, in pursuance to this decree, to Edward H. Pardee. On March 16, 1896, the sale was confirmed, and on April 9, 1896, a deed was made to the purchaser. The decrees of foreclosure and confirmation described the property in the same terms of description used in the mortgage. The deed, however, also embraced the land described in the Powell deed and the decree cancelling the deed. In this respect the deed to Pardee was not authorized by any order of court, and it is of course without effect, except to the extent that the third Company actually owned the property, and to the extent that it was in fact embraced in the Central Trust Company mortgage and foreclosure decree. (R. pp. 98-103.)

(15) The title, or claim of title, of Edward H. Pardee, was acquired for the benefit of himself and Collis P. Huntington. (R. p. 14.)

(16) The claim of title of plaintiffs in this suit was as follows:

(a) Deeds dated December 27, 1897, from the surviving directors of the first Company, acting as trustees, to C. A. Bumpas, trustee, purporting to convey all the property involved in this suit. (R. pp. 119-121.)

(b) Execution sales to C. C. Bumpas, trustee, of the Dallas and Houston County lands involved in this suit, under a judgment in favor of W. F. Thompson, against the first Company, rendered on March 18, 1887, in the District Court of Dallas County, Texas, in a suit instituted November 4, 1881. The Dallas County lands were sold as aforesaid on April 2, 1895, and the Houston County lands on October 1, 1895, and deeds duly executed. (R. pp. 114-116.)

(c) Judgment of the District Court of Dallas County, Texas, in favor of C. C. Bumpas, trustee, and against the surviving directors of the first Company, as trustees, and John H. Gaston, as receiver of the third Company, rendered April 7, 1898, in a suit instituted May 2,

1895, and adjudging to Bumpas, trustee, the title and possession of all the lands involved in this suit. (R. pp. 116-119.)

(d) Deed executed, pending said suit last above mentioned, on January 16, 1896, from C. C. Bumpas, trustee, to Aldridge, Hardie and Mowry, trustees, plaintiffs in this suit, purporting to convey to plaintiffs all the lands involved in this suit. (R. pp. 121-123.)

Plaintiffs thus established title to all the lands involved in this suit, whether originally acquired by the first Company, the second Company, or the third Company, unless defendants acquired a superior title through the proceedings heretofore mentioned. Both the state and Federal courts having held the Powell deed absolutely void *ab initio*, because the execution sale was made against a corporation which had been dissolved, as well as for other reasons, the issues become narrowed to the questions whether of not the International Trust Company and Central Trust Company mortgages and foreclosure sales embraced the lands in controversy, or any of them.

(17) An examination of the language of description in the International Trust Company and Central Trust Company mortgages, (*ante*, paragraphs 2, 10), discloses that these mortgages do not specifically describe any lands, and, giving full effect to all the language, it may be properly condensed into "lands actually used or acquired for railroad purposes." The ultimate issues, therefore, were whether or not, prior to the foreclosure of said mortgages, the lands in controversy, or any of them, were actully used for railroad purposes, or actually acquired for railroad purposes. Of course, the use of the land, or the intention to use it, for railroad purposes *after* the foreclosure, could not broaden the terms of the decree, or confer title to what did not pass by the decree and sale.

(18) On the trial the court held that the uncontradicted evidence showed that the "bonus lands" were not used or acquired for railroad purposes, and under a peremptory charge of the court there was a verdict and judgment for plaintiffs as to these lands, which judgment was in this respect affirmed by the Court of Civil Appeals. (R.

pp. 18, 40, 210.)

(19) As to the Hughes & Slaughter and Mays tracts, the court submitted numerous special issues to the jury, some of which were on the ultimate issues in the case, and others on mere matters of evidence. On the ultimate issues in the case, the jury found:

(a) That all the Hughes & Slaughter and Mays tracts, (except the right of way not sued for by plaintiffs), was originally acquired by the Railroad Company (No. 1) for subdivision and sale into town lots. (See answers to special issues 4, 5, 14, Record, pages 43, 45.)

(b) That prior to the foreclosure of the International Trust Company mortgage, on January 31, 1883, no part of the Hughes & Slaughter tract in controversy was actually used for railroad purposes. See 6 and 7, record, pages 43, 44.

The above are the only findings on what we regard as the material ultimate issues. There was no finding on the question whether or not any part of the Mays tract in controversy was actually used for railroad purposes, prior to the foreclosure of the International Trust Company mortgage. There was no evidence of any such use prior to said date.

There were a number of special findings on the question what the Railroad Company would reasonably need under various circumstances, or did actually need; but we regard these as findings on mere evidential facts at most, as neither mortgage purported to include what the Railroad Company might *need* for railroad purposes, but only what it actually used or intended to use for railroad purposes. As the Company might, in the opinion of the jury, use what it did not need, or need what it did not use or intend to use, we regard these findings as, at most, merely evidential. The special findings also embraced other evidential matters; but we have stated the findings on the ultimate issues in the case.

(We will here anticipate to observe, as we will hereafter more fully show, that under the Texas practice, a verdict on special issues need not include all the issues in the case, that the court passes on all issues of fact not submitted to the jury, that special findings on mere

matters of evidence are not binding on the court, and may be ignored, and that special findings on ultimate issues are binding on the court, whether supported by the evidence or not, and judgment must be rendered accordingly, unless on motion for a new trial such findings on the ultimate issues are set aside and a new trial granted.)

(20) Believing that this court will not undertake to determine the sufficiency of the evidence to support the special findings of the jury on the ultimate issues in the case, we have thus far not undertaken to present the evidence on these issues. With this exception, we have attempted to state all matters necessary to an understanding of the questions now presented, omitting all matters not necessary for this purpose.

However, as we may be mistaken in assuming that the court will not review the evidence on the question of the purpose for which the property in controversy was used or acquired, we have, with some doubt as to its propriety, concluded to present a brief statement of the most direct and important evidence on these issues. In an appendix we purpose to present a more detailed statement, substantially copied from our brief in the Court of Civil Appeals. If it is regarded as immaterial, it, of course, need not be considered.

Bonus Lands.—All these lands were donated to induce the construction and extension of the railroad. (R. pp. 124, 132.) Most of these lands were deeded to the first Company. The lots and blocks in Kemp were deeded to the second Company. The lots and blocks in Crandall, and 7½ acres near Kaufman, were deeded to the third Company. This appears from the dates of the deeds, (R. pp. 2-7, 75), and the dates when the several Companies were organized. (*Ante*, par. 5.) There is no evidence that any of these lands were ever used, or intended to be used, by any of the Companies for any purpose whatever. Most of this property consists of wild timber lands, not adjacent to the railroad. (R. p. 124.)

Use of Hughes & Slaughter and Mays Tracts.—There is absolutely no evidence that prior to the foreclosure of the International Trust

Company Mortgage any use whatever was made of the portions of these tracts in controversy in this suit. The seventh special issue (R. p. 20), erroneously assumed that there was evidence of a minor use, but the jury correctly answered that there was no such evidence. There was evidence that in 1891, eight years after the foreclosure of the International Trust Company mortgage, and five years after the organization of the third Company, a part of a temporary "Y" was found on the Hughes & Slaughter tract, (R. pp. 125, 128), but no witness testified when it was put there.

There were some railroad tracks and small buildings near the west line of the Hughes & Slaughter tract, and a track and switch on the Mays tract, but these improvements were shown without dispute to have been included in the right of way of 100 feet not sued for by plaintiffs, and not recovered by them. (R. pp. 124-126, 128.) See maps opposite page 124 of the record, showing the condition of the Hughes & Slaughter tract on June 14, 1895, and the Mays tract on September 22, 1891, and June 4, 1895. These maps were made long after the International Trust Company foreclosure, and show the condition of the property on the respective dates when the maps were made.

PURPOSE IN BUYING HUGHES & SLAUGHTER AND MAYS TRACTS.

The testimony is undisputed that it was the purpose of the first Company to use as a terminal a tract of about 17 acres not in controversy in this suit, and designated in the record, from its shape, as the "flat iron tract," and located at the junction of the Texas and Pacific, and Texas Trunk railroads. After the foreclosure of the International Trust Company mortgage this property was lost through failure to pay for it. (R. pp. 130, 134.) Its location is shown on plat opposite page 128 of the record. General W. L. Cabell, vice-president and general manager of the first Company, testified that it was the intention to use as much as was necessary of the Hughes & Slaughter and Mays tracts for tracks and switches, and subdivide the balance into town lots. (R. pp. 121, 132.) W. M. Johnson testified that the right of

way of 100 feet not in dispute was much more than the Company actually used or needed. (R. pp. 124-130.) The jury found, in response to special issues 4, 5, 11, 12 and 14, that all of the Hughes & Slaughter and Mays tracts, except the right of way of 100 feet not sued for, was acquired by the Railroad Company for the purpose of subdividing the same into town lots and selling the same to employes of the Company; that considering the reasonable intentions and actual or probable present or future needs of the Company, no part of the Hughes & Slaughter tract, except said right of way, was reasonably necessary for the construction, equipment or operation of the railroad, either at the date of the International Trust Company mortgage or at the date of its foreclosure. (R. pp. 19-22.) These findings are given, although, as already stated, some of them are probably of a merely evidential character. (For a substantially complete statement of all the evidence on these issues, see appendix to this brief.)

(21) Both plaintiffs and defendants moved for judgment, both motions being in general terms, and not purporting to present any Federal question. (R. pp. 39, 40.) The court thereupon rendered judgment for the plaintiffs for the "bonus lands," and for defendants for the Hughes & Slaughter and Mays tracts. (R. pp. 40-53.) Plaintiffs moved to reform the judgment, and render judgment for plaintiffs for all the lands in controversy. (R. pp. 23, 57.) This motion was overruled, and plaintiffs thereupon excepted and gave notice of appeal to the Court of Civil Appeals, (R. pp. 60, 61), where this action of the trial court was assigned as error. (R. p. 177.) These assignments were sustained by the Court of Civil Appeals, which rendered the judgment which it was held the trial court should have rendered. (R. pp. 199-210.)

After the entry of judgment in the district court, defendants moved for a new trial, complaining of sundry alleged errors of the court, but not complaining of the verdict as being in any respect contrary to or unsupported by the evidence. (R. pp. 58-60.) This motion having been overruled, (R. p. 61), defendants also appealed; but, as already stated,

the Court of Civil Appeals decided adversely to defendants below. On the trial in the district court, defendants requested numerous special charges to the jury. It becomes necessary to notice only special charges 8, 9, and 12:

Special charge No. 8 requested the court to *peremptorily* direct a verdict for defendants, on the alleged ground that *all* the property sued for was included in the Federal court decree foreclosing the International Trust Company mortgage, thereby assuming, not only that the "bonus lands" were included, but that also the decree included the lands subsequently acquired by the second and third Companies, and also assuming that the evidence in favor of defendants was uncontroverted. (R. p. 34.)

Special charge No. 9 requested the court to *peremptorily* direct a verdict for defendants, on the ground that *all* the property sued for was included in the Federal court decree foreclosing the Central Trust Company mortgage against Gaston, receiver of the third Company, thereby assuming that the third Company had acquired title to all the lands of the first Company and second Company, and that all these lands, including the "bonus lands," were included in the foreclosure, and also that the evidence in favor of defendants, was uncontroverted. (R. pp. 34, 35.)

Special charge No. 12 requested the court to *peremptorily* direct a verdict for defendants, as to the Hughes & Slaughter and Mays tracts, on the alleged ground that these tracts were "brought into the custody of the Federal court" by the decree cancelling the Powell deed, thereby assuming that the Powell deed was valid, (although as already shown, both state and Federal courts held it absolutely void *ab initio*), and also assuming that the decree which cancelled the Powell deed because it was void had the effect of transmitting valid title under the Powell deed, and also assuming that defendants had acquired such title under the Central Trust Company foreclosure, which did not describe the land embraced in the Powell deed, and also assuming that

the evidence to that effect was uncontroverted. (R. pp. 36, 37.)

These charges were all refused, which rulings were complained of by assignments of error 10, 11, and 12, in the Court of Civil Appeals; and the refusal of the Court of Civil Appeals to sustain these assignments is made the basis of the first, second and third assignments in the United States Supreme Court, these being the only specific assignments presented. (R. pp. 231, 232.)

MOTION TO DISMISS.

Defendants in error have filed a motion to dismiss the writ of error for want of jurisdiction, on the grounds that the record does not present any real or substantial Federal question, nor does it appear that any Federal question was presented to the Supreme Court of the State of Texas, or that any Federal question was raised in the proper time and manner in the state courts; and it does appear from the record that said cause was decided by the Court of Civil Appeals on questions of local and general law, not involving any Federal question, and sufficiently broad to support the judgment of said Court of Civil Appeals, without reference to any Federal question or questions that plaintiffs in error may have sought to raise.

ARGUMENT.

Of course we do not question the correctness of the general proposition that when it becomes necessary to determine whether or not the court below properly construed, or gave proper effect to, a judgment or decree of a Federal court, a Federal question is thereby presented. National Foundry, etc., v. Oconto Water Supply Co., 183 U. S. 216, 233, and cases cited. But in order to give this court jurisdiction, it must also appear that the claim of Federal right has been by adequate specification called to the attention of the state court, and that a general claim of Federal right, such as embraced in the fourth and fifth assignments of error in this case, is wholly insufficient. Capital City Dairy Co. v. Ohio, 183 U.S. 238,248,citing Green Bay & Miss.Canal Co.v. Patten Pap r

Co. 172 U. S. 52, 57; Oxley Stave Co. v. Butter Co. 166 U. S. 648, 654, 655. It must also appear that the claim of Federal right is real and substantial, and not merely an asserted Federal right having no colorable foundation in the record. New Orleans Water Works Co. v. Louisiana, 185 U. S. 336, 344, and cases cited. It must also appear that the asserted Federal right was properly claimed in the state court, according to the rules of procedure governing the practice of the state court, under such circumstances that the state court actually decided the question, or was under the duty to decide it. Erie Railroad Company v. Purdy, 185 U. S. 148, citing Spies v. Illinois, 123 U. S. 136, 181; Miller v. Texas, 153 U. S. 135, 538; Morrison v. Watson, 154 U. S. 111, 115. The Federal question must be a question of law, not of fact. Therefore, when the question was whether or not the land in controversy was embraced in a patent from the United State, the validity of the patent not being disputed, and the case involved merely the construction of the language of the patent, and the question how far the measurements of the courses and distances carried the boundary, it was held that no Federal question was presented. Sweringen v. St. Louis, 185 U. S. 38, 41. There are other limitations on the jurisdiction now sought to be invoked, which, so far as deemed necessary, will be hereafter mentioned.

The motion to dismiss the writ of error is based upon several grounds, which we will separately present.

(A) The Texas Supreme Court having denied defendants' petition for a writ of error to the Court of Civil Appeals, it is settled that the writ of error from the United States Supreme Court was properly directed to the Court of Civil Appeals, and no question is made on that account. Bacon v. Texas, 163 U. S. 207. The record in this case shows that the Supreme Court of Texas denied defendants' petition for a writ of error, but the record does not contain a copy of the petition, and it therefore does not appear upon what grounds a writ of error was asked.

The Texas Statutes provide as follows:

"Any person desiring to sue out a writ of error before the supreme

court shall present his petition, addressed to said court, stating the nature of the case, and the grounds upon which the writ of error is prayed for, and showing that the supreme court has jurisdiction thereof." R. S. Art. 942.

"If it shall appear to the supreme court, from an inspection of the petition and record, that there is error in said judgment of the court of civil appeals, it shall grant a writ of error returnable in thirty days, in such manner as may be prescribed by the court." R. S. Art. 943.

The petition for the writ of error must contain specific and direct assignments of error. Hodo v. R. R. Co. 88 Tex., 523; Hillard v. White, 88 Tex., 591; Brown v. Elmendorf, 87 Tex. 58. An error of the court of civil appeals not complained of in the petition for writ of error will not be considered by the Supreme Court. I. and G. N. Ry. Co. v. Miller, 87 Tex. 430; Frey v. R. R. Co. 86 Tex. 467.

We understand that the United States Supreme Court will not entertain jurisdiction of a writ of error to a state court, unless the record affirmatively shows that the plaintiff in error has exhausted his remedies in the state courts. Manifestly this does not appear when the record merely shows that a petition was unsuccessfully made to the Supreme Court for a writ of error, without showing on what grounds the petition was based, especially when under the state statutes and settled rulings of the state courts the Supreme Court will consider only such alleged errors as are specifically pointed out in the petition. We are not aware that this precise question has been ruled upon by the United States Supreme Court, but we submit that it can not be properly presumed that any Federal question was raised in the petition for writ of error to the Texas Supreme Court, when the record is silent on the subject.

(B) Federal questions were sought to be raised in the trial court only by requesting special charges to the jury, which charges were refused by the court. No exception was taken to the refusal of these charges. It is true that under the Texas statutes, (R. S. Art. 1320), it is provided that "when instructions asked, or some of them, are refused, * * * they shall constitute a part of the record of the court,

subject to revision for error without the necessity of taking any bill of exceptions thereto." There is, however, nothing in the Texas statutes prohibiting an exception to the refusal of a charge. It is elementary that at common law error can not be assigned on the giving or refusing of a charge to the jury, unless an exception is taken at the bar before the jury retires, and such an exception is duly preserved in a bill of exceptions; and such is the settled practice in the Federal courts, regardless of state legislation dispensing with the necessity for such exception. St. Clair v. United States, 154 U. S. 134. The Seventh Amendment provides that "no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law." This provision of the Constitution applies to writs of error from the United States Supreme Court to a state court. C. B. & Q. Ry. Co. v. Chicago, 166 U. S. 236. Section 709, U. S. R. S. gives the United States Supreme Court jurisdiction to revise on writ of error final judgments of state courts, subject to certain limitations, among which are that a Federal right must have been "specially set up" in the state court, and that "the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." This statute unquestionably governs the procedure that must be had in the state court in order to give this court jurisdiction, and a Federal right may be sufficiently asserted, according to the rules governing the state practice, and yet its assertion may be wholly insufficient to comply with the above statute. This is too well settled to require citation of authorities. If, as has been settled, that Act of Congress governs the procedure that is necessary in the state court, it is not perceived why the Seventh Amendment should not also govern. We therefore submit that if a party to a suit in a state court desires to secure and preserve the right to have a final judgment revised on writ of error by the United State Supreme Court, he must proceed as required both by the Act of Congress and the Seventh Amendment. His alleged Federal right must be "specially set up and claimed" as prescribed by the Act of Congress; and if this has been attempted by a special charge to the jury, the refusal

of such charge must be excepted to, and the exception preserved in a bill of exceptions, according to the "rules of the common law," as required by the Seventh Amendment, although all of this may be wholly unnecessary under the state practice.

(C) The special charges attempting to raise Federal questions were properly refused, for several reasons wholly independent of the question of the existence or non-existence of a Federal right. It is not deemed necessary to cite additional authority in support of the proposition that when a party desires to raise a Federal question he must do so at the proper time and in the proper manner, and in accordance, not only with the Act of Congress, but also in accordance with the rules of practice governing the state courts, at least when they are not in conflict with any provision of the Constitution of the United States, or any Act of Congress.

If these charges were properly refused, regardless of the existence or non-existence of any Federal right, then no error was committed by the trial court in refusing them, and no error was committed by the Court of Civil Appeals in overruling the assignments of error complaining of their refusal by the trial court, and this court will not review the judgment of the Court of Civil Appeals, if it appears that the rulings complained of were proper, independent of any Federal question, or based upon grounds involving no Federal question. We think it is demonstrable that plaintiffs in error proceeded in direct conflict with the settled rules of practice in Texas courts. This makes it necessary to call attention to provisions in the Texas statutes. The Texas Revised Statutes of 1879 provided as follows:

"Art. 1328. The verdict of a jury is either a general or a special verdict.

"Art. 1329. A general verdict is one whereby the jury pronounce generally in favor of one or more parties to the suit upon all or any of the issues submitted to them.

"Art. 1330. A special verdict is one wherein the jury find the facts only on issues made up and submitted to them under the direction of

the court.

"Art. 1331. The special verdict must find the facts as established by the evidence, and not the evidence by which they are established, and the findings must be such as that nothing remains for the court but to draw from such facts the conclusions of law.

"Art. 1332. A special verdict found under the provisions of the two preceding articles shall, as between the parties, be conclusive as to the facts found.

"Art. 1333. The jury shall render a general or special verdict, as may be directed by the court; and the verdict shall comprehend the whole issue or all the issues submitted to them."

In construing these statutes, in Silliman v. Gano, 90 Tex., 637, it was held that a special verdict must comprehend every material fact put in issue by the pleadings, and that the court can not look to the evidence to aid or supplement the verdict, although the evidence might be wholly without conflict. While the court recognized and enforced this rule, it also disapproved the rule, and suggested legislation on the subject. In the meantime the above statutes had been carried forward without change into the Revised Statutes of 1895. On June 18, 1897, the following statute was passed:

"Section 1. Be it enacted by the Legislature of the State of Texas: That Article 1331, Chapter 13, Title 30, of the Revised Civil Statutes of 1895, be amended so as to read as follows:

"Art. 1331. The special verdict must find the facts established by the evidence, and not the evidence by which they are established; and it shall be the duty of the court when it submits a case to the jury upon special issues, to submit all the issues made by the pleading. But the failure to submit any issue shall not be deemed a ground for reversal of the judgment upon appeal or writ of error, unless its submission has been requested in writing by the party complaining of the judgment. Upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain

such a finding.

"Sec. 2. The fact that much inconvenience and intolerable delay accrue to litigants in this State, the tendency of which is to prolong litigation and crowd and burden the dockets of the courts, for want of a law authorizing a simple and expeditious method for the decision of controverted questions of fact by special verdict, creates an imperative public necessity requiring the suspension of the constitutional rule which requires bills to be read on three several days, and that this act take effect and be in force from and after its passage, and it is so enacted.

Approved, June 18, 1897."

This statute constitutes chapter 7 of the General Laws of the Special Session of the Legislature in 1897, and was in force when this case was tried in the district court. By this amendment the chancery practice of submitting special issues to the jury was in the main adopted, subject to the important qualification that under the Texas statute a special finding of the jury is conclusive, unless set aside in a proper proceeding, although it may be wholly unsupported by, or contrary to, the evidence. "The findings of the jury upon the issues made by the pleadings in a case, although against the undisputed evidence, or without evidence to support them, can not be disregarded, but must constitute the only basis upon which proper judgment can be rendered. It is probable a different rule should prevail where a finding is not upon an issuable fact, but upon some fact which is merely evidence bearing upon some issue made by the pleadings." Gaines C. J. in Waller v. Liles, 70 S. W. 17, (October 20, 1902), citing Ablowich v. Bank, 67 S. W., 79.

On reading the present statute it will be perceived that the trial judge may submit such special issues as he may deem proper on his own motion, but that he is under no absolute duty to submit any particular issue unless specially requested to do so by a party to the suit, and, in the language of the statute, "upon appeal or writ of error, an issue not submitted and not requested by a party to the cause, shall be deemed as found by the court in such manner as to support the judgment; provided, there be evidence to sustain such finding." The record in this case discloses that

while defendants requested the submission of numerous special charges, they did not request the submission of any special issues whatever, or complain of the findings of the jury on any of the special issues that were submitted. Defendants ignored the finding of the jury on the material issues of the case, and moved for judgment regardless of these findings.

It will now be perceived that the special charges requested by defendants were properly refused for several reasons, not involving any Federal question.

In the first place, it was within the discretion of the court whether to submit the case under a general charge, calling for a general verdict, or to submit the case on special issues, and then determine what judgment should be rendered, and the exercise of this discretion is not subject to review, and obviously involves no denial of any Federal right. Moreover no complaint was or is made as to the manner in which the case was submitted, and any such complaint, if made, would simply raise a question of procedure under the state law, and not a Federal question, and the judgment of the state court of last resort on such a quetion is, of course, final. It may therefore be properly assumed that the trial court adopted the proper practice, so far as mere method of procedure is concerned, in requiring a general verdict as to the "bonus lands," and a verdict on special issues as to the Hughes & Slaughter and Mays tracts.

When the court, in the proper exercise of its discretion, determined to submit these special issues, it of course followed that no charges on the law should be given except such charges as would be calculated to aid the jury in properly answering the issues submitted for their determination. It is obvious that the special charges requested by defendants had no bearing whatever on any of the issues that were submitted to the jury, and that they were properly refused for that reason, even if they, or some of them, expressed correct legal propositions. Cole v. Crawford, 69 Tex. 124. No special issues were requested to which the requested charges would apply. Therefore defendants did not raise any Federal question in a proper manner. It would, perhaps, have been proper practice to have raised a Federal question in the motion for judgment after verdict, but

no Federal question was sought to be raised in the motion filed by defendants. (R. p. 40.) In short, all the special charges were properly refused, because they had no application whatever to the issues submitted to the jury, and no issues were requested to which they would apply. Therefore, even if these special charges expressed correct legal propositions, the trial court committed no error in refusing them, and the Court of Civil Appeals did not err in so holding, and there is therefore no basis for the assignments of error now presented.

In the second place, all the special charges were properly refused, because they were of a peremptory character and were in other respects clearly improper. It can not be and is not pretended that the vidence showed beyond dispute that defendants were entitled to judgment for all the lands in controversy, because of any claim of Federal right. The charge quoted in the first assignment, (R. p. 23), undertook to peremptorily instruct the jury that the decree against the first Company foreclosing the International Trust Company mortgage embraced all of the property involved in this suit, although it is undisputed, as already shown, that a part of the property was never owned by the first Company, but was subsequently acquired by the second and third Companies, and there was no evidence that any of the "bonus lands" were included in the decree, and, as stated by the Court of Civil Appeals, (R. p. 204), "it is not seriously contended by defendants that the (bonus) lands in Dallas, Houston and Kaufman Counties, and for which plaintiffs recovered judgment (in the district court) were so embraced." Neither can it be seriously contended that the evidence showed *beyond dispute* that *all* of the Hughes & Slaughter and Mays tracts were included in the mortgage and foreclosure decree.

Substantially the same criticism may be properly made of the charge quoted in the second assignment of error. (R. p. 232.) It sought to *peremptorily* instruct the jury that the Central Trust Company foreclosure decree against the receiver of the third Company embraced *all* the property involved in this suit, although it was and is substantially undisputed that it did not embrace any of the "bonus lands," and there is

no reasonable color for the contention that the *undisputed evidence* showed that the third Company ever acquired the Hughes & Slaughter and Mays tracts, or that *all* of these tracts were included in the Central Trust Company mortgage and foreclosure decree, even if the third Company owned them.

The charge quoted in the third assignment, (R. p. 232), undertook to *peremptorily* instruct the jury that the decree of the Federal court cancelling the Powell deed "was effectual to establish and to bring into the custody of said court" the Hughes & Slaughter and Mays tracts, "and you are therefore instructed to return a verdict in favor of defendants for said two tracts of land." This charge assumes that the Powell deed was valid, and that the decree of the Federal court which cancelled the Powell deed, because it was void, had the effect of transmitting valid title under the deed, and that defendants had acquired such title either under the Central Trust Company foreclosure, which did not describe the land, or by the deed from Powell and associates made after their claim of title had been cancelled. We do not deem it necessary to discuss these various contradictions, especially as there is a complete answer to this assignment on another ground.

The Court of Civil Appeals decided that the Powell deed was absolutely void *ab initio*, because it was made under an execution sale against the first Company after such Company had been dissolved as a corporation by the International Trust Company foreclosure sale. (R. p. 209.) This ruling rests upon Articles 4260 and 4264 of the Revised Statutes of 1879, providing as follows:

"Art. 4260. In case of the sale of the entire road-bed, track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust, or any other power, the purchaser or purchasers at such sale and their associates, shall be entitled to have and exercise all the powers and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and

taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits theeof, in the same manner and to the same extent as if they were the original corporators of said company; and shall have power to construct, complete, equip and work the same road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws.

"Art. 4264. Whenever a sale of the road-bed, track, franchise and chartered powers and privileges is made as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority), the directors and managers of the sold-out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold-out company, and shall have full powers to settle the affairs of the sold-out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and necessary expenses; and the persons so constituted trustees, shall have the authority to sue by the name of the trustees of such sold-out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands."

These statutes went into effect on September 1, 1879, before the Railroad Company was first incorporated. (See Final Title, Sec. 22.)

It is undisputed that the International Trust Company foreclosure sale embraced "the entire road-bed, track, franchise and charter rights" of the first Company, whether it embraced any of the property now in controversy or not. Under the statute, therefore, the original Company was then dissolved as a corporation, and its then directors become statutory trustees of any residuary assets not embraced in the foreclosure sale. The decision of the Court of Civil Appeals to this effect is in accordance with the authorities. Elliot on Railroads, sec. 75; 5 Thomson on Corporations, sec. 6739; R. R. Co. v. Trust Co., 95

Federal Rep. 497, 534. The decision that a valid execution sale can not be made against a dissolved corporation, is also in accordance with the authorities. National Bank v. Colby, 21 Wall, 609. At any rate, these were all questions of local law, upon which the decision of the state court is final. The effect of a foreclosure sale of the entire roadbed, track, franchise and charter rights of a corporation created under the state statutes, is, obviously, a question of local law. Again, the judgments against the first Company, under which the executions were issued, were all rendered in the state courts; the executions were, of course, issued from the state courts, and the proceedings under the executions, including the sheriff's deed to Powell and associates, were all acts of an officer of the state courts. Nowhere does any question of Federal authority arise. In deciding that the Powell deed was void *ab initio*, the Court of Civil Appeals did not decide any Federal question. The effect of this decision was to leave the title to the property in question in the trustees of the first Company, who were not parties to the suit in the Federal court resulting in the decree mentioned in the special charge. Therefore this decree becomes wholly immaterial. The state court having in this respect placed its decision on a question of local law sufficiently broad to support the judgment, this Court will not enquire whether or not any Federal question was properly decided. This rule is now too well settled to require citation of authorities.

It thus appears that none of the special charges properly raised any Federal question that this Court should review.

(E) In the next place, the first and second assignments, (R. pp. 231, 232), have been substantially waived. This presents a point of practice which is perhaps not entirely clear. We have, after proper notice, filed in this Court certified copies of the briefs filed by defendants in error in the Court of Civil Appeals, upon which briefs this case was there submitted. These briefs contain certain admissions, to which we will call attention, which, in our judgment, have the effect of waiving the assignments referred to. The question is, can the

briefs be looked to for this purpose? We think that they can. We will first point out what the briefs show, and then give our reasons for believing that they can be properly considered.

Plaintiffs in error filed two briefs in the Court of Civil Appeals, one as appellants, the other as appellees, as they occupied that dual capacity. These briefs substantially admitted that defendants (now plaintiffs in error), had no title whatever to any of the "bonus lands," and the judgment in favor of plaintiffs below for these lands was sought to be reversed solely on the ground that the plaintiffs had not shown any title to the same, and that it was incumbent on plaintiffs to prove title. In other words, as to the "bonus lands," defendants below relied entirely on the asserted weakness of plaintiffs' title. As plaintiffs' chain of title raised no Federal question, and it is not even claimed that any such question was thus raised, the decision of the state courts affirming the validity of plaintiffs' chain of title is of course final, and the present effect, therefore, of the admissions is, that plaintiffs below owned the "bonus lands," and the controversy becomes limited to so much of the Hughes & Slaughter and Mays tracts as were recovered by plaintiffs below.

This is shown both by the record and by the briefs referred to.

The brief filed in the Court of Civil Appeals by the present plaintiffs in error, as appellants in that court, concludes as follows: "We submit that the judgment in favor of plaintiffs should be reversed and rendered in favor of defendants, *because plaintiffs failed to show title to any of the property in controversy.*" (See page 62 of certified copy on file with the record.)

In the brief filed in the Court of Civil Appeals by the present plaintiffs in error as appellees in that suit, they say:

"As we have said before, the only fair criticism upon the charge of the court is for submitting any issues to the jury at all. The testmony is altogether without conflict, and it was the duty of the court to apply his view of the law to the case as made by the evidence, and instruct the jury accordingly. The court considered that the plaintiffs

had shown title to all the land sued for except the right of way and the Hughes & Slaughter tract and the Mays tract, and he, therefore, in his first instruction (Record, 25) directed the jury to return a verdict in favor of plaintiffs therefor. The defendants, by their appeal in this case, as shown by their brief heretofore filed in support thereof, complain of the judgment so rendered, not because of the method of the court, *but because of the view of the court respecting the sufficiency of plaintiff's title. If the evidence was sufficient to show title, then the court was right in instructing the jury peremptorily to find for the plaintiffs as to the lands which were awarded to them.*" (See pages 110, 111, of certified copy of brief on file with the record.)

In the opinion of the Court of Civil Appeals, (R. p. 204), the court says: "It is not seriously contended by defendants that the lands in Dallas, Houston and Kaufman Counties, and for which plaintiffs recovered judgment, were so embraced" (in the foreclosure decrees).

The Rules of the Court of Civil Appeals provide as follows:

Rule 29, that each assignment (of error) not copied (in the brief) and accompanied with its appropriate propositions and statements, shall be regarded as abandoned."

Rule 40, "When it shall be found that the rules prescribed for the preparation of a case for submission have been fully complied with by the appellant or plaintiff in error, the court will, in its discretion, regard this brief as a proper presentation of the case, without an examination of the record as contained in the transcript, and may found its decision thereon unless the appellee or defendant in error shall, by the time of calling the case, file in the Appellate Court copies of his brief, to be kept there with the transcript, containing his objections, succinctly and definitely, to the grounds of error as presented in the propositions of appellant or plaintiff in error in his brief."

Article 1039 of the Revised Statutes provides for filing opinions of the Court of Civil Appeals, which thereby become part of the record.

It thus becomes manifest that there was no real controversy in the Court of Civil Appeals on the proposition that none of the "bonus

lands" were included in either mortgage foreclosure, but that the correctness of this proposition was substantially, and evenly expressly, admitted by the present plaintiffs in error. This necessarily involved the admission that the special charges which asserted that all the lands in controversy, including the "bonus lands," were so included, were properly refused by the court. This applies to the charges quoted in the first and second assignments of error in this court. (R. pp. 231, 232.) For this and other reasons it was so obvious that these charges were properly refused that the Court of Civil Appeals does not even mention them. The court merely says:

"Holding, as we do, that the lands in controversy were never embraced by the International Trust Company mortgages, it follows that the title to the lands did not pass out of the original Company by the foreclosure proceedings of said mortgage, and it is not necessary for us to discuss the other questions presented by the briefs of the parties." (R. p. 209.)

Can this court consider the admissions in the briefs above referred to? We recognize the general rule that the question of jurisdiction must be answered from the record alone, and that briefs are not strictly a part of the record. But there are qualifications to this rule. While, in this character of case, it would not be admissible to show by matter *dehors* the record that the court *has* jurisdiction, we think it is admissible to show that the court has *not* jurisdiction, or that, if it has jurisdiction, it should not be exercised. Every court has the inherent power to ascertain all matters of fact necessary to the exercise of its jurisdiction. For example, if the court should be informed, in any authentic way, that a case of apparent jurisdiction in fact presented no real controversy, the court would undoubtedly dismiss the case, or order it stricken from the docket; and in determining the question, the court would not consider itself confined to what appeared in the record. This is in principle the same thing. This court is asked to determine an apparent controversy, when there was no real controversy on the question in the Court of Civil Appeals. This court

is asked to rule that the Court of Civil Appeals erred in accepting the admissions of plaintiffs in error, and deciding the case accordingly. As heretofore stated, we understand that the United States Supreme Court will not, on writ of error to a state court, decide any question unless the plaintiff in error shall have first exhausted his remedies in the state court. The law contemplates a real and earnest controversy in the state court, before there shall be any controversy here. It may not be strictly a question of whether or not this court has jurisdiction. The question may perhaps be better stated: Assuming that this court has jurisdiction, should such jurisdiction be exercised, when it is clearly apparent that there was no real controversy on the question in the state court? The matter is not deemed of sufficient importance to warrant further argument, as we think the case can be properly disposed of in our favor on several other grounds.

(F) The writ of error should be dismissed because the real question in controversy is a question of fact, and in no proper sense a question of law. There was and is no controversy as to the validity of either of the Federal court foreclosure decrees. It was and is admitted that they passed title, as against the defendant in each suit, to all the property described in the respective decrees.

It can not, of course, be seriously contended that either decree passed title to property not described in it, or that either decree was binding on parties not before the court, in person or by legal representation. It therefore can not be contended that the decree foreclosing the Central Trust Company mortgage against the receiver of the third Company was in any sense binding on the trustees of the first Company, who were not parties to the suit; and for the same reason the decree cancelling the Powell deed can not be invoked against the trustees of the first Company, whose title is now held by defendants in error. The question of the validity of plaintiffs' chain of title having been disposed of in their favor, the only controverted questions were whether or not the foreclosure decrees described that part of the Hughes & Slaughter and Mays tract claimed by plaintiffs. If it be determined

that the International Trust Company decree did not describe and include the land, it becomes necessary to enquire further; because if the title did not thus pass, the land was never owned by third Company, against whose general receiver the Central Trust Company mortgage was foreclosed. It is perfectly obvious that neither mortgage or decree described any land particularly. Whether or not any land, and if so what land, was included, was left by the very language of the mortgages and decrees, to be determined by reference to extrinsic evidence showing what lands, if any, owned by the respective Companies, were used or acquired for railroad purposes. Where part of the tract was used or intended for railroad purposes, and part not so intended or used, it becomes simply a question of boundary, to be determined from the evidence by the jury, as held by the Court of Civil Appeals. We are unable to distinguish the case in principle from Sweringen v. St. Louis, 186 U. S. 38, 41, holding that when the question was whether or not the land in controversy was embraced in a patent from the United States, the validity of the patent not being disputed, and the case involved merely the construction of the language of the patent, and the question how far the measurements of the courses and distances carried the boundary, no Federal question was thereby presented. See also Provident Savings Society v. Ford, 114 U. S. 695; Metcalf v. Watertown, 128 U. S. 586, to the effect that the mere fact that an action is founded on a judgment or decree of a Federal court does not necessarily present a Federal question. On the ultimate issues in the case, the Court of Civil Appeals held that the findings of the jury were warranted by the evidence, and the Supreme Court of Texas, by refusing a petition for the writ of error, approved this ruling. An examination of the evidence, as recited in the opinion of the Court of Civil Appeals, and as more fully presented in an appendix to this brief, will show that this ruling was unquestionably correct.

Article 1027 of the Revised Statutes of Texas is as follows:

"When the judgment or decrees of the court below shall be reversed, the court shall proceed to render such judgment or decree as

the court below should have rendered, except when it is necessary that some matter of fact be ascertained, or the damage to be assessed, or the matter to be decreed, is uncertain, in either of which cases the cause shall be remanded for a new trial in the court below."

The facts having been made certain, by the agreemnt of the parties as to most of the facts, and the findings of the jury as to the others, the Court of Civil Appeals proceeded under this statute to render such judgment as the court below should have rendered; and this action was approved by the Supreme Court of Texas.

The Court of Civil Appeals held that the trial court "erred in giving the jury peremptory instructions to find certain facts." (R. p. 209.) The matter is not discussed by the court. This ruling was correct, and did not necessitate the remanding of the case for a new trial, for the following reasons:

The facts upon which these peremptory instructions were given were not ultimate facts, but were, at most, merely evidential in character. The charges were erroneous, because in Texas it is provided by statute that a judge "shall not charge or comment on the weight of the evidence." R. S., Art. 1317. It is held to be a violation of this statute for a charge to give undue prominence to parts of the testimony. Randall v. Gill, 77 Tex. 351; Heldt. v. Webster, 60 Tex. 207; Railway v. Harriett, 80 Tex. 73. There are numerous other cases to the same effect, but it is not deemed necessary to cite them. The charges were also erroneous because they assumed that the opinion evidence of the "experts" was conclusive. Head v. Hargrove, 105 U. S. 45; The Conqueror, 166 U. S. 110. It was not necessary to remand the case for a new trial, because the special findings of the jury on merely evidential facts could be ignored as surplusage, and this was done. Hutchins v. Bacon, 46 Tex. 408; Gaines v. Bank, 64 Tex. 18; Walter v. Liles, 70 S. W. 17. The general rule on this subject is well stated in 28 Am. & Eng. Enc. of Law, 390, as follows: "If a special verdict, in addition to the facts at issue, contains conclusions of law, facts collateral to or outside of the issue, or evidence of facts instead of facts them-

selves, such additional matter is surplusage, and may be ignored by the court; and, if the verdict, stripped of its superfluity, is yet sufficient to support a judgment either way under the issues, a motion for a *venire facias de novo* will be overruled." The material issues in this case, under the terms of description used in the International Trust Company mortgage, were whether or not those parts of the Hughes & Slaughter and Mays tracts claimed by plaintiffs were in fact acquired or used for railroad purposes prior to the foreclosure of the mortgage in 1883. It is immaterial to what use the property was *subsequently* put, or for what purpose the portions *not* claimed by plaintiffs were used or acquired, or what the Company may have *needed* under this or that contingency, except as these matters of mere evidence may be considered by the jury determining the above mentioned material issues in this case. The mortgage did not cover, or purport to cover, what the Company might *need,* but only what the Company might use or intend to use for railroad purposes. The Company might, in the opinion of the court or jury, need what it did not use or intend to use, or use or intend to use what it did not need. Moreover, the peremptory charges under consideration and findings of the jury thereunder, make no distinction between the land plaintiffs claim and the land they do not claim. They do not declare for what purposes the portion of the tracts claimed by plaintiffs were used or acquired. They do not declare whether the railroad uses were before or after the foreclosure of the mortgage, or whether on the land claimed by plaintiffs or the land conceded to defendants. They do not even declare that the land in *controversy* was "needed" by the Company. They merely declare that under a supposed contingency, which never happened, the Company would need "as much" as the land in controversy, while, in response to other issues, the jury found directly that *the land in controversy* was not needed. The verdict rendered in response to these peremptory instructions determined no issue in the case, but amounts to a mere finding on some of the matters in evidence in the case. It is not in conflict with the special findings of the jury on the real ultimate is-

sues in the case. On these issues the jury expressly finds that the land claimed by plaintiffs was acquired for subdivision and sale into town lots, which is not a railroad purpose, and that prior to the foreclosure sale the land was not used for railroad purposes. Under these findings the land did not pass by the foreclosure.

We have deemed it proper to allude to the above rules of procedure in Texas, because they are so well established that the Court of Civil Appeals did not deem it necessary to discuss them in its opinion. The distinction, however, between ultimate facts, and facts which are merely evidential in character, is elementary and has been frequently pointed out by this court. Wilson v. Merchants' Loan & Trust Co. 183 U. S. 121; United States Trust Company v. New Mexico, 183 U. S. 585, and cases cited.

The Court of Civil Appeals says, (R. p. 207): "When the case is submitted on special issues, if there is testimony tending to support the findings of the jury, then it is the duty of the court to render judgment in accord with such findings. We are of the opinion that the evidence did not warrant a verdict for defendant, but warranted the findings of the jury on the issues submitted for their determination." Again, (R. p. 209), the court says: "In view of the evidence, we think the trial court erred in giving to the jury peremptory instructions to find certain facts. We are also of the opinion that the evidence supports the findings of the jury on the special issues submitted, and that judgment should have been rendered thereon for plaintiffs."

The above language may be capable of the construction that when the evidence does not support the special findings of the jury, such special findings may be disregarded in rendering judgment. Clearly, however, this is not the meaning of the court. Having held that the evidence was sufficient, it was not necessary to decide what should be done if the evidence had not been sufficient. The exact question has been decided by the Texas Supreme Court in Waller v. Liles, 70 S. W. 17 and Ablowich v. Bank, 67 S. W. 79, since the decision of this case, and had previously been decided in Clark & Loftus v. Pearce, 80 Tex.

146 and Western Union Tel. Co. v. Mitchell, 89 Tex. 441.

It is well settled by these and other cases that the verdict of the jury on the material, ultimate issues in a cause, is binding, regardless of the sufficiency of the evidence to support the verdict, unless a motion to set aside the verdict has been made and overruled in the trial court. Unless a verdict be set aside on motion it is conclusive as to the facts found by the verdict, R. S. 1332. When the facts have been thus found, and no motion to set aside the findings has been made, or such a motion has been properly overruled, and the trial court has rendered an erroneous judgment, it is the duty of the Court of Civil Appeals to render such judgment as the trial court ought to have rendered, and not remand the case for a new trial. R. S. Art. 1027. When no motion has been made to set aside the findings of the jury, or when such motion has been properly overruled, the appellate court, under the present statute, can review the evidence only on such material issues as have not been passed upon by the jury, resolving all such issues, when the evidence is conflicting, in favor of the judgment, but, when the evidence is not conflicting, rendering such judgment thereon, in harmony with the material findings of the jury, as may be proper. Laws 1897, Sp. Ses. Ch. 7; R. S. Art. 1027.

No motion was made by defendants in the district court to set aside the findings of the jury on the ground that they were contrary to the evidence, or on any other ground. A motion for a new trial, under the Texas practice, must be made within two days after the return of the verdict. R. S. Art. 1373. The only motion filed by defendants was filed seventeen days after the return of the verdict, and this motion does not question the sufficiency of the evidence to support the findings. (R. p. 40.) The question of the sufficiency of the evidence to support the special findings was therefore not before the Court of Civil Appeals, and is not before this court. But, as stated by the Court of Civil Appeals, the special findings complained of by plaintiffs in error are fully supported by the evidence, and they would not be disturbed, even if the question of sufficiency of the evidence was

properly before the court. That the evidence was sufficient to support these special findings has been held first by the district court, (R. p. 47), second by the Court of Civil Appeals, (R. p. 209), and third, presumptively at least, by the Texas Supreme Court, in refusing the petition for a writ of error. Even in cases where the United States Supreme Court has jurisdiction to review the facts, it is the settled practice that the concurrent decisions of two courts on questions of fact will be followed, unless shown to be clearly erroneous. Brainard v. Buck, 184 U. S. 99, 105.

But has this court any such jurisdiction in cases arising on writ of error to state courts? We understand that no such jurisdiction exists, whether the facts be found by a jury, or by the court without a jury. Bartlett v. Lockwood, 160 U. S. 357; Noble v. Mitchell, 164 U. S. 367; M. K. & T. Ry Co. v. Haber, 169 U. S. 613; Hedrick v. A. T. & S. F. Ry. Co. 167 U. S. 673; Chemical Natl. Bank v. City Bank, 160 U. S. 646; Egan v. Hart, 165 U. S. 188; Israel v. Arthur, 152 U. S. 355; Dower v. Richards, 151 U. S. 658; Jenkins v. Neff, 186 U. S. 230, 235; Bement v. National Harrow Co. 186 U. S. 70, 83; U. S. Rev. Stat. Sec. 1011.

The effect of these authorities, as we understand them, is that findings of fact in a state court, whether by court or jury, are conclusive on this court, regardless of the question of the sufficiency of the evidence to support the findings.

It is also to be observed that there is no assignment of error that undertakes to raise any such question; and, as already pointed out, the special charges requested by defendants did not properly raise any Federal question, for numerous obvious and sufficient reasons, wholly independent of any question of Federal right. These reasons have already been sufficiently presented.

We have not discussed the fourth, fifth and sixth assignments of error, (R. pp. 232, 233), because we suppose that they are intended merely to reaffirm the first three assignments. If more is intended, we have no means of knowing what it is, and any discussion of the

matter by us would be mere speculation. Tested by themselves, we think these assignments, (4, 5 and 6), are altogether too vague and indefinite to present any question for review. The rule requiring an assignment of error to be definite and certain has been too frequently announced to render citation of authorities necessary.

ARGUMENT ON THE MERITS.

What we have said has had particular reference to the question of jurisdiction. The merits of the case were also incidentally discussed. We will now present further argument on the merits. This case was submitted by plaintiffs in the Court of Civil Appeals substantially on the following propositions:

(1) Plaintiffs' established title to all the land in controversy, except such land, if any, deeded to the first Company, as was embraced, by legally sufficient description in *both* the mortgage foreclosure sales. In other words, the deeds from the trustees of the first Company to Bumpas, and the judgment of Bumpas against said trustees, and against Gaston, receiver of the third Company, can not be collaterally attacked by defendants, under their pleadings.

(2) As to the land deeded to the third Company, the deed being the agreed common source of title, and defendants having shown no title, the judgment in favor of Bumpas against Gaston, receiver of the third Company, and the deed from Bumpas to plaintiffs, established title in plaintiffs.

(3) As to the land deeded to the second Company, the deed being the agreed common source of title, and defendants having shown no title, and it being established and agreed that all the property of the second Company passed to the third Company, the judgment in favor of Bumpas against Gaston, receiver of the third Company, and the deeds from Bumpas to plaintiffs, establish title in plaintiffs.

(4) As defendants do not even pretend that any of the land in controversy deeded to the first Company, except the Hughes & Slaughter and Mays tracts, was embraced in either mortgage foreclosure, the foregoing propositions establish that the judgment of the district court, so

far as it was in favor of plaintiffs, was correct.

(5) As to the Hughes & Slaughter and Mays tracts, defendants can not defeat a recovery by plaintiffs, on account of the sheriff's deed to Powell and associates, because

(a) The execution sale to Powell having been made against the first Company, *after* it had been dissolved as a corporation, and under judgment rendered *before* its dissolution, the sale was absolutely void.

(b) The deed was cancelled in the suit of Atkins, receiver, v. Campbell et al., in the Federal court, because it was void for the reasons above stated.

(c) As Atkins, receiver, recovered the property from Campbell, Powell, et al. before the foreclosure of the Central Trust Company mortgage, and before there was any adjudication that there was any valid mortgage, or that any particular property was embraced in the mortgage, and as Gaston was not a party to the suit of Atkins v. Campbell, Powell et al., said decree cancelling the Powell deed was not, and could not be, so far as Gaston was concerned, an adjudication that the property was embraced in the Central Trust Company mortgage. In other words, when Atkins recovered from Powell, Campell et al., Atkins was receiver in a suit wherein the Central Trust Company was plaintiff and Gaston, receiver of the third Company, was defendant. As between said plaintiff and defendant, the recovery by, and possession of Atkins was not and could not be adverse to either, but was subject to the rights of each, as such rights might be subsequently adjudicated between themselves. At least up to the time of final decree, Atkins, receiver, held all property in his possession or the title and possession of which he may have recovered for the benefit of both the Central Trust Company and Gaston, receiver, or whichever of them should, on final decree, be held entitled to the property, or any part of it. The decree in Atkins, receiver, v. Campbell et al., was not an adjudication in favor of the Central Trust Company, or against Gaston, because neither were parties to the suit, and there was no issue between them, and Atkins recovered on behalf and for

the benefit of both, and their rights, as between themselves, were not adjudicated until the final decree of foreclosure was subsequently passed. The effect, and the only effect of the decree in Atkins, receiver, v. Campbell et al., and all that said decree purported to or could adjudicate, was that Atkins, receiver, recovered the property embraced in the decree for the benefit of both the Central Trust Company and Gaston, receiver, or whichever of them should be held entitled to the property on final decree of foreclosure. In other words, we do not attack the decree in Atkins, receiver, v. Campbell et al., but insist that it be given the effect, and the only effect, it purported to have, and is entitled to receive.

(d As subsequent to the decree in Atkins, receiver, v. Campbell et al., the Central Trust Company mortgage was foreclosed, and as it is established by the evidence and the verdict of the jury that the decree of foreclosure did not embrace that part of the Hughes & Slaughter and Mays tracts now claimed by plaintiffs, the effect of the foreclosure decree and sale was to leave the title to these lands in Gaston, receiver, so far as the parties to that suit, or Powell and associates, may ever have had any title. While it is true that Atkins, receiver, purported to deed the Hughes & Slaughter tracts to Pardee, yet this was done without authority or order of court, and the deed was, in this respect, therefore void. The repeated statements, or rather implications, in defendants' briefs, that Atkins had any authority to convey these lands to Pardee is certainly not supported by, and is plainly against the record.

(e) The Federal court receivership was, in legal effect, terminated on the consummation of the sale to Pardee, and thereafter all unsold property was, in contemplation of law, in the possession of Gaston, receiver.

(f) Bumpas having subsequently recovered judgment for the property against Gaston, receiver, and Bumpas having conveyed to plaintiffs, the title of plaintiffs is established, even though it be held that the Powell deed was valid. The judgment of Bumpas v. Gaston, receiver, can not be collaterally attacked, even though it be held that

sub-proposition (e) *supra* is unsound, and that the *custody* of the property was still in the ostensible Federal receiver, because the *title* was unquestionably in Gaston, and the *title* is all that is in issue in this case.

(g) If sub-proposition (a) *supra* is sustained, the remaining sub-propositions become immaterial and need not be considered. (This proposition was sustained by the Court of Civil Appeals.)

(h) The deeds which Pardee subsequently obtained from Powell and associates conveyed no title, because (a) Powell and associates never had any title to convey, and (b) prior to their deeds to Pardee whatever claim of title they may have had was cancelled by the decree in Atkins, receiver, v. Campbell et al., and (c) whatever title they may have had and that Atkins may have recovered, had passed to Gaston, receiver, from whom it passed to plaintiffs, through the judgment in favor of Bumpas against Gaston, receiver, and the deeds from Bumpas to plaintiffs.

(6) The foregoing propositions cover the main material questions in this case, except the question whether or not that portion of the Hughes & Slaughter and Mays tracts claimed by plaintiffs was included by legally sufficient description, in *both* the foreclosure decrees. We say *both*, because if not embraced in the first foreclosure, the title remained in the trustees of the sold-out Company, and plaintiffs have title through the deeds from said trustees to Bumpas, the judgment of Bumpas against the trustees, and the deed from Bumpas to plaintiffs.

If, however, the land passed by the first foreclosure, it is agreed and established that it became the property of the second Company, and that all the property of the second Company passed to the third Company, and to Gaston, receiver. Therefore unless the property also passed to Pardee under the Central Trust Company foreclosure against Gaston, receiver, the title remained in Gaston, receiver, and the subsequent judgment in favor of Bumpas against Gaston, receiver, and the deeds from Bumpas to plaintiffs, vested title in plaintiffs. It in-

evitably follows, therefore, that as plaintiffs have title under all three Companies, in order to prevent a recovery, defendants must show that the land passed by *both* foreclosures, and it is sufficient for plaintiffs if it appears that the land was omitted from *either* foreclosure.

(7) An examination of the language of the mortgage and foreclosure decrees demonstrates that

(a) The land is not specifically described in either mortgage or decree, and is therefore not included in either, unless legally embraced in the words of general description that were used.

(b) The International Trust Company mortgage and decree has two, and only two, terms of general description (1) property, etc., "purchased and to be purchased *for* the construction and equipment of said road," and (2) appurtenances, etc., "used for and pertaining to the operation of said railroad." Both would be fully embraced in the single phrase, "property actually used or acquired for railroad purposes."

(c) The Central Trust Company mortgage and decree has a single verbose clause of general description, which can be condensed properly into "property owned or to be owned for railroad purposes."

(8) In construing said decrees it is important to note, that while the record contains direct evidence, and special findings of the jury, as to the specific purpose for which the first Company acquired the property, there is absolutely no evidence as to the purpose for which the *third* Company acquired, or attempted to acquire, or pretended to acquire the property, except as the purpose of the Company is shown by its acts in using or not using the property, and the evidence and verdict of the jury establish that neither at the date of the Central Trust Company mortgage executed by the third Company, nor at the date of its foreclosure, was any of the property now claimed by plaintiffs actually used by the Company for any purpose whatever. There is therefore absolutely nothing in the Central Trust Company mortgage or decree that can be construed to include the land in controversy. If this view is correct, it ends the case, and nothing further need be considered. We

will, however, show that the land was not included in the International Trust Company mortgage and foreclosure, the following propositions being submitted for this purpose:

(9) In order to determine what is meant by "railroad purposes" we may properly look to the statutes. Under the statutes land acquired by a railroad company for sub-division and sale into town lots is not acquired for "railroad purposes," and is not included in a mortgage which does not purport to include all property owned by the company, but only such property as is "used or acquired for railroad purposes."

(10) Even if it be held that the property was included in the International Trust Company *mortgage*, the description in the *decree* is so vague and uncertain that it is void, tested by the rules governing judicial sales.

(11) A judicial sale is void for uncertainty unless "the property is described with sufficient certainty to enable all parties to identify it and know what was being sold." It is not sufficient "that there should exist the means of showing at some future time what is otherwise indefinite and uncertain, but that, at the time of the sale, it should be within the power of all who are by the notice invited to become bidders, to *know* what is offered, and that it should not be surmised and guessed at some future time as to what the officer intended to sell."

(12) While a description in a judicial sale will not be pronounced void, merely because it is general, or because the land can not be certainly identified, fro mthe description alone, yet the description, to be valid, must be sufficient to put the owner and purchasers upon such inquiry "as will afford the means of *complete* information."

(13) The principle announced in proposition (12) means that the description must be such "that a person *familiar with the land* (not with the unknown purpose of the owner) can identify it *from the description thus given.*"

(14) Conceding, for the sake of argument, that "lands *used* for railroad purposes" would be sufficient to convey lands *actually, unequiv-*

ocably and visibly used, at the time of the foreclosure and sale, in the operation of the railroad, on the ground that "a person familiar with the land could identify it from the description thus given," it is clear that "lands *acquired* for railroad purposes" is, under the principles above stated, an insufficient description, where at the time of the foreclosure and sale the land is not actually, visibly and unequivocably used for railroad purposes, and it can not be certainly ascertained either from the public records, or from an inspection of the land, or from any other certain, plain and authentic source, for what purpose the land was acquired. Such a description does not "afford the means of complete information," even though there may be accessible information from which it may be "surmised or guessed as to what the officer intended to sell."

(15) Under the principles stated in propositions 10 to 14 inclusive, the description in both the foreclosure decrees were void for uncertainty, so far as the land now claimed by plaintiffs are concerned, even though the court or jury *might now* be of the opinion, from all the circumstances, that they were "acquired for railroad purposes." *Now* is not the time to make certain what was *then* hopelessly uncertain. If this proposition be sustained, it becomes unnecessary to go further: but, even if it be not sustained, the following propositions are submitted in support of our contention that under the verdict of the jury the land in controversy was certainly not embraced in either foreclosure.

(16) Whether or not the lands in controversy, or any of them, were "used or acquired for railroad purposes" by either the first Company or the last, was a question of fact, and not a question of law.

(17) There was sufficient evidence in favor plaintiffs to at least justify and require the submission of said question to the jury.

(18) Even if the court should be of the opinion that there was not sufficient evidence in favor of plaintiffs to warrant the submission of the issue to the jury, nevertheless, as the court, without objection, did submit the issue, upon which the jury found in favor of plaintiffs, and as the verdict was approved by the court and has not

been set aside, and no motion was made by defendants to set it aside, and as defendants do not, by assignment of error, complain of the verdict, and could not do so in the absence of a motion for a new trial in the district court to set aside the verdict, it must be held that the verdict is conclusive, in so far as it is upon material issues, regardless of the evidence upon which it is based.

(19) So far as the verdict was on immaterial or merely evidential issues, it may and should be disregarded in rendering judgment. The judgment must be based upon the verdict of the jury on the ultimate and material issues in the case.

(20) As neither railroad mortgage or foreclosure decree purported to include property "necessary" for the railroad, but they only purported to include property actually used for railroad purposes, and as property might be deemed "necessary" for the railroad without being *actually* used or acquired for railroad purposes, it follows that whether or not the property in controversy in the case was "necessary" for the railroad was an immaterial issue, and, at most, the question of the necessity of the property for the railroad could be looked to merely as *evidence* on the issue whether or not it was in fact intended for railroad purposes.

(21) If, however, it be held that "necessity for railroad purposes" was a material, ultimate issue, the question was whether or not the *particular property in controversy* was so necessary; and the jury having specifically found, that *the particular property in controversy* was *not* reasonably necessary for the "construction, equipment or operation," or for the "construction, repairs, renewals, improvements, completion, operation, or management" of the railroad, and the verdict never having been set aside, and no motion having been made to set it aside, the issue, if it is an issue, is decided in favor of plaintiffs, and the verdict of the jury can not be reviewed in this court, as the record stands, and if reviewed, the verdict is abundantly supported by the evidence.

(22. The findings of the jury, in response to the peremptory in-

struction of the court (to which plaintiffs excepted) to the effect that if the road had been properly constructed and operated, it would need "as much as 25 acres," and "would need sand," is wholly immaterial, and does not in any respect conflict with the special findings mentioned in paragraph 21, *supra,* because

(a) *Said findings do not apply, and do not purport to apply, to the land in controversy,* as shown by the language of the findings themselves, especially when considered in the light of the testimony of *all* the witnesses that the Hughes & Slaughter tract is *utterly unsuitable* for a terminal, however much the road might need a terminal, and the testimony of defendants' witness Whyte that the railroad could get "sand" off its right of way, as well as off the Mays tract, and the improbability that the road would haul sand from the Mays tract for any considerable distance, when the sand could be got along the right of way.

(b) The fact that the findings are qualified by "if the road was properly constructed and operated" renders them too vague to form the basis of any judgment. They amount, at most, to a mere finding on an immaterial and argumentative issue. (Note—If the court had considered that the evidence showed that *the particular property in controversy* was necessary for the railroad, it is quite clear that he would have said so in his peremptory charge, especially when we note the extent to which the court went in charging on the evidence.)

(23 The charges and findings mentioned in paragraph 22, *supra,* are mere charges and findings on the evidence, and evidence on immaterial issues, and should be ignored in rendering judgment.

(24) *The positive and direct findings of the jury that the property in controversy, was neither used nor acquired for railroad purposes, but that it was all acquired for subdivision and sale into town lots, settle the material and only material issues of fact in the case; and, as such findings have not been set aside, and have never been complained of in such a way as to be subject to review, they require that the judgment of the court below, so far as it was against plaintiffs, should*

be reversed and rendered in their favor.

(25) The testimony in the record that at some time or other, no witness knew when or where, there was a Y which extended into the land claimed by plaintiffs, does not affect the result, because

(a) Plaintiffs having shown title from common source, the burden of proof was on defendants, claiming under the mortgage foreclosures, to show what property, if any, was embraced in such foreclosures, and they completely failed to locate the time when or place where said Y was built or operated.

(b) The jury having found that neither at the date of the International Trust Company mortgage, nor at the date of its foreclosure, was said Y on the ground, it follows that the land once occupied by the Y, whenever and wherever it may have been, was not embraced in said mortgage or said foreclosure.

(c) The jury having also found that the Y was not on the ground at the date of the Central Trust Company mortgage, and the undisputed evidence and verdict of the jury showing that every vestige of it had been removed, and the land abandoned, years before said mortgage was foreclosed, it follows that the land once occupied by the Y, whenever and wherever it may have been, was not embraced in the Central Trust Company mortgage or foreclosure.

(d) The evidence having shown, and the jury having found that the use of the land for a Y was merely temporary, to be used only until the construction of a turn-table, the land temporarily occupied by the Y would not be included in either mortgage or foreclosure in any event. The evidence shows that a turn-table was actually begun on the land not claimed by plaintiffs. When the Company used the terminals of other railroads, as it did most of the time, it did not need either Y or turn-table, which was doubtless the reason why the turn-table was never finished.

We confidently submit that the foregoing propositions of law present a correct view of the case. The Court of Civil Appeals considered and sustained a sufficient number of these propositions to show

that plaintiffs were entitled to judgment, and then very properly passed the other propositions without discussion, because their consideration had become unnecessary. We are not yet advised to what extent, if at all, these propositions will be controverted by oppsing counsel. We therefore will not further discuss them now. When we are furnished a copy of brief of opposing counsel, we may, if deemed necessary, and if we shall have the opportunity, submit an argument in reply. We have discovered an inadvertent error of statement on page 2 of this brief, where it is stated that there was excepted from both the Hughes & Slaughter and Mays tracts a right of way 100 feet wide. Plaintiffs disclaimed as to 100 feet on the west side of the Hughes & Slaughter tract, and 200 feet through the Mays tract, and all other tracts traversed by the railroad, and as to this right of way there was no controversy, and defendants recovered judgment for the same. (R. pp. 150, 210, 211.) As already shown, defendants thus recovered all the land actually used for railroad purposes, as well as some land not so used; and, according to the verdict of the jury, which is not excepted to, and which is fully supported by the evidence, defendants thus also recovered all the lands that was ever in fact intended to be used for railroad purposes.

We respectfully pray that the writ of error be dismissed, and, in the alternative, that the judgment of the Court of Civil Appeals be affirmed.

Respectfully submitted,

W. J. Moroney

Counsel for Defendants in Error.

APPENDIX.

STATEMENT OF THE EVIDENCE ON THE QUESTION OF THE PURPOSE FOR WHICH THE PROPERTY IN CONTROVERSY WAS ACQUIRED AND USED.

(1) *Texas Trunk Charter.*—The Texas Trunk Rrailroad Company was chartered November 6, 1879, under the Texas Revised Statutes of 1879, with authority to build a railroad from Dallas to Sabine Pass, with a branch to the Louisiana line, in all about 350 miles. Its authorized capital was $5,000,000. Its paid up capital, so far as the record shows, was $21,000. As thus organized it is designated in the record as the *first Company.* (R. pp. 76, 85.)

In 1883 there was a mortgage foreclosure sale of its entire roadbed, track, franchises and chartered rights, and other property included in the mortgage, and the purchasers reorganized under the original charter, as authorized by statute, thus constituting what is designated in the records as the *second Company.* (R. pp. 82, 85.)

In 1885 there was another sale under execution, etc., and the purchasers reorganized under the original charter, thus constituting what is designated in the record as the *third Company.* (R. p. 89.)

(2) *Common Source of Title.*—The agreed common source of title to the respective tracts of land are sundry deeds to the Texas Trunk Railroad Company, under its successive organizations, most of the property being deeded to the first company. These deeds are as follows:

(3) *The Hughes and Slaughter Tract,* 1680 feet approximately north and south by 650 feet approximately east and west, containing about 25 acres, was deeded to the Texas Trunk Railroad Company (No. 1) by W. E. Hughes and C. C. Slaughter by deed bearing date March 13, 1880, but not actually delivered until several months thereafter, about September 25, 1880, the consideration being $2,500. When purchased this land was in the country, a mile, more or less, beyond the Dallas City limits. In 1889 the city limits were extended to include it. This is the principal tract of land involved in this suit. Plaintiffs

do not claim a strip 100 feet wide on the west side of this tract, this strip including the land used for railroad purposes. (R. pp. 2, 75, 123, 150.)

(4) *The Mays Tract.* 600 feet approximately north and south by 919 feet approximately east and west, containing 11.92 acres exclusive of railroad right-of-way, was deeded to the Texas Trunk Railroad Company (No. 1) by S. P. Mays on February 2, 1881, the consideration being $348.60. This tract is a couple of miles, more or less, from the Hughes & Slaughter tract, and is outside the city limits. Plaintiffs do not claim a strip of land 100 feet on each side of the center of the main track of the railroad, through the tract, this strip, 200 feet wide, including all the land that was ever used by the Railroad Company for any purpose. (R. pp. 2, 75, 128, 150.)

(5) *Bonus Lands.*—All the other lands involved in this suit were donated in aid of the construction of the railroad, and were never used by the railroad. Most of the lands were deeded to the first Company. The lots and blocks in Kemp were deeded to the second Company. The lots and blocks in Crandall, and 7 2-3 acres near Kaufman were deeded to the third Company. (R. pp. 2-7, 75, 124, 132.)

(6) *Original Construction.*—During 1880 and 1881 the road was built from Dallas to Kaufman, about 36 miles, and some grading was done beyond Kaufman. About 476 $1,000 bonds were issued, 152 absolutely and 324 as collateral. A large floating indebtedness was also incurred. (R. p. 80.)

(7) *The Second Company.*—On June 15, 1883, the purchasers under the International Trust Company foreclosure and their associates reorganized the Company with a paid up capital of $540,000, representing the purchased property. (This was $211,185.25 more than the bonded indebtedness established by the foreclosure decree, and $377,500 more than the aggregate of the bids at the sale.) (R. pp. 82, 84.)

(8) *The Extension to Cedar.*—After the reorganization of the second Company, as stated, it made a contract with O. T. Lyon & Co. to extend the road to Cedar, a point upwards of 50 miles from Dallas.

This was done to save the charter from forfeiture, it being necessary, under the law as construed by the attorney general, to build at least 50 miles of road by November 20, 1883. This contract was completed and the Company (No. 2) issued to O. T. Lyon & Co. its note for $130,000 and interest, which was transferred to E. M. Reardon, who held it in trust for O. T. Lyon & Co. and associates. (R. p. 86.)

(9) *The Reardon Suit.*—Suit was brought by Reardon in the District Court of Dallas County, on said $130,000 notes, and on May 18, 1885, he obtained judgment against the Company (No. 2) for $149,102.76, with 10 per cent. interest and costs. (R. p. . .), and execution sales were made under this judgment as heretofore stated. (R. pp. 86, 88).

(10) *The Third Company.*—On November 13, 1885, the purchasers under the Reardon executions and United States marshal's sale reorganized the Company under the original charter, with a paid up capital of $750,000, representing the purchased property. All the property acquired by J. E. Schneider and associates under the several sales above mentioned properly vested in this third Company. (R. p. 89.)

(11) *Proposed Terminal.—Gaston Tract.*—The record contains a map showing that between the Hughes & Slaughter tract on the south, and the T. and P. railroad on the north, there is a tract of about 17 acres in approximately the shape of a flat iron, this tract being referred to in the record as the "flat iron tract." (R. p. 128.)

When the Texas Trunk Railroad Company was incorporated, W. H. Gaston owned this "flat iron tract." He also owned land west of the Hughes & Slaughter tract, and more land on the south, running to Grand Avenue, a distance of about 2,570 feet. Gaston also owned about 400 acres of other land in the vicinity. (R. pp. 138-140.)

The Texas Trunk Company contracted to purchase the flat iron tract from Gaston, and when it was paid for the Company was to have a deed to this tract, and a deed to a right-of-way over his other land to Grand Avenue. There was no written contract except that Gaston executed a deed and turned it over to his attorneys, to be delivered to the

Company when the purchase money was paid. (R. pp. 130-133, 138-140.)

By agreement between Gaston and the Texas Trunk Company, the Company went into possession under this agreement. The Company began the construction of its road on the flat iron tract, extending from the T. and P. railroad along and near the west line of the "flat iron tract" 1,307 feet to the Hughes & Slaughter tract, thence along and near the west line of the Hughes & Slaughter tract 1,680 feet to Gaston's land on the south, thence through Gaston's land 2,570 feet to Grand Avenue.

When the road got into trouble a year or two afterwards, Gaston resumed possession of all the "flat iron tract," except that part occupied by the tracks of the railroad. He afterwards sued the Company for the land occupied by the tracks, on the flat iron tract, and the 2,570 foot strip to Grand Avenue, and obtained judgment for the same. The Company has since been permitted to occupy the land, *but has never had any title to the same*, the deed never having been delivered or the purchase money paid.

The evidence shows that it was the intention of the Company to use the "flat iron tract" for its terminal, and to place thereon its depots, shops, etc. It was considered ample and specially desirable for that purpose, as it was at the junction of the Texas and Pacific, and Texas Trunk. (R. pp. 130-135, 138-140.)

The jury found, in answer to the 19th special issue, that when the Hughes & Slaughter tract was acquired by the Railroad Company it was the intention of the Railroad Company to use the Gaston "flat iron tract" for its terminal, and for depots, shops, etc. (R. p. 23.)

This finding has never been set aside, or in any way excepted to by defendants.

(12) *Purpose in Buying Hughes & Slaughter Tract.*—W. L. Cabell, who was vice-president, acting president, land commissioner and for a time general manager of the first Texas Trunk Company, and who acted for the Company in the purchase of the Hughes & Slaughter tract, testified in reference to said tract as follows: "We bought the 25 acres for

railroad purposes, laying down switches, and such things as that, and if the land was not required, to sell it into lots for the employes to live on. All that was necessary for tracks and switches was to be used for that purpose. When said 25 acres was purchased, it was the intention of the Company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots, and let the men employed by the Railroad Company purchase them and build residences on them, in order to be close to their work. That was the intention of the road, and at the same time they were to use all that was necessary for switches and tracks, and such things as that. There was an old well on the 25 acres tract when we purchased it. All of the land east of the well was to be sold off into lots. That was the understanding between us. That was our idea. I can not tell without some calculation how many tracks could be put on a hundred feet of ground. They generally put them down far enough apart to prevent them from bothering each other; six or eight tracks, though, very easily. We never had but two tracks when I had anything to do with it. We thought the land we would get from Gaston would be ample to put all of the depots and shops on it. We intended to put a car shed on the 25 acres. The depot was just a little building we purchased from somebody, and it was put there for temporary purposes on the Hughes & Slaughter tract, to keep it from being in the way when we built a regular depot. We did not consider at all the contingencies that would arise from nonpayment. We considered the Gaston land very important for the reason that it was closely connected with the Texas and Pacific, and it was in a fine location. That 25 acres is the only land the Company ever bought and actually paid for that is now in the City of Dallas." (R. pp. 131-132.)

This is the testimony upon which the court (over plaintiff's exceptions taken at the time), charged the jury as follows: "At the time it was purchased it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the said railroad, and whatever switches and side tracks

should be necessary in the operation of the road, and if these did not occupy all the land, then to sell lots on the eastern side of the land to its employees so that they might be near their work; no such sales have ever been made, nor has any part of the land been subdivided into lots." (R pp. 18, 63.) In response to the fourth and fifth special issues the jury found that "all but 100 feet off the west boundary line of the Hughes & Slaughter tract was originally acquired by the Texas Trunk Railroad Company for the purpose of subdividing the same into lots and selling the same to employes of the Company." (R. pp. 19, 20.) This finding has never been set aside, or in any way excepted to by defendants.

(13) *Purpose in Buying Mays Tract.*—W. L. Cabell testified as follows: "The Mays tract was bought the same way; that is, the railroad should use whatever was needed for tracks and sand, and the balance was to be divided into lots." (R. p. 132.)

William Whyte, federal receiver, who has been in the employment of the Huntington roads 28 years, testified as follows: "We have been hauling sand from the Mays tract for the last six or seven years to repair the road-bed and for surfacing it and keeping it in order; it was necessary for that purpose. I presume that about two acres of the land was used up to March 16, 1896. There is no other place on the road where we would get sand to ballast the track, *except off the right of way.* This Mays tract is necessary for sand to ballast our track; I do not know how we could get along without it exactly." (R. p. 142.) W. M. Johnson testified: "The Company only used about 1½ acres of the land for sand and gravel." (R. p. 130.)

At some time not shown by the testimony a switch for sand cars was put on the land, extending at no point more than 75 feet from the main track. (R. pp. 126, map, 124.) There is no testimony that any sand has ever been taken beyond the 200-foot strip that is not claimed by plaintiffs, or that any switch was actually put on the land or any sand taken from it, even inside the right of way, prior to the Dillingham

receivership, when the witness Whyte first became connected with the road.

The above is the only basis in the testimony for the following direction by the court to the jury: "It had on it sand. At the time it was purchased it was the purpose and intention of the Railroad Company and its officers to use the sand in the construction and ballasting of the road-bed, and also to place on it such switches and side tracks as might be necessary in the operation of the road; the main track of the road was built across it near the Eastern boundary, and also a spur track running out from the main track (but near to it) across the land so as to reach the sand; sand has since been taken from the land and used in the construction and repairing and ballasting the road; the road has thus occupied about two acres of the tract." (R. p. 42.) This was excepted to by the plaintiffs at the time. (R. p. 63.) It will be observed that the court says nothing about the purpose of the Company to sell the land out into town lots.

In response to special issues 3a and 14, the jury found that the Mays tract "was not bought by the Texas Trunk Railroad Company for use, either immediate or prospective, in the construction, repair or improvement of its railroad," and that "all of that portion of the Mays 11.92 acres tract sued for by the plaintiffs was originally acquired by the Railroad Company for the purpose of subdividing the same into lots and selling the same to employes of the Company." These findings have never been set aside or excepted to by defendants. (R. pp. 19, 22.)

(14) *The Railroad Use of Mays Tract.*—The preceding paragraph states the substance of the evidence on this point. There is absolutely no evidence that the Railroad Company, under any of its organizations, or through any of its numerous receivers, ever used for any purpose whatever any part of said Mays tract beyond the 200 foot right-of-way, which right-of-way is not claimed by plaintiffs.

(15) *The Railroad Use of the Hughes & Slaughter Tract.*—What is said of the Mays tract is substantially true of the Hughes & Slaughter tract, except 100 feet off the west side thereof, not claimed by plaintiffs.

The property has never been used for a terminal, except for short and infrequent intervals. From 1880 to 1884 trains were run over the "flat iron tract," and west on the T. and P. to the Union Depot. Then for about four years they used the Santa Fe depots and terminals. Finally, in 1892, about a mile of new track was built, commencing about 700 yards beyond the Mays tract and extending to the H. and T. C. railroad; and since 1892 all regular trains have run over this new track and the H. and T. C. track to the H. and T. C. depots and terminals. Since 1892 the tracks in actual regular use have been about 700 yards from the Mays tract, and about 1½ miles from the Hughes & Slaughter tract, but the old tracks are occasionally used for switching purposes.

The Railroad Company originally built its main track, commencing at the T. and P. on the Gaston "flat iron tract," thence running across the "flat iron tract" and entering the Hughes & Slaughter tract on its north line, 48 feet from its northwest corner, thence extending south and approaching the west line, finally emerging from the Hughes & Slaughter tract 25 feet from the southwest corner, where the road again enters the Gaston land and extends through Gaston's land some 2,570 feet to Gaston Avenue; the course of the road from this point to the Mays tract not clearly appearing, and not being of any importance in this case. A parallel siding was constructed 12 feet east of the main track, extending from the T. and P. 1,307 feet across the "flat iron tract," and into the Hughes & Slaughter tract, joining the main track 434 feet south of the north line.

These are the only tracks of a permanent character ever constructed on or near the land. There was an old abandoned well without curbing on the land when it was purchased, but it was never used by the railroad. The Company bought a little shanty, without a ceiling, 12x14, and a small tank, and moved them on the land near the north corner, west of the main track. This shanty, worth about $25, was sometimes used for a ticket office, and the tank worth $75 to $100, was used to water the engines and cars. Both were mere temporary affairs, intended for use only until permanent buildings should be erected on the "flat iron tract."

A car shed, consisting of merely a plank roof on poles, worth not over $50, was built near the siding. The foundations for a two-stall round-house were also laid, but at what time does not appear. It only appears that their remains were found on the land in 1892.

At one time a switch extending from the main track west, to a connection with the Santa Fe, but this was taken up when they stopped running to the Santa Fe depots.

In 1891 one branch of a Y was found on the land, extending to about the center of the tract. The witness Whyte *thinks* that both branches were then there, but W. M. Johnson, who surveyed the land September 22, 1891, found only one branch. Witnesses testified that a Y *needs* two branches and a "tail," but no witness testified that this Y was ever thus equipped, or finished in any way. No witness testified when the Y (such as it was) was built.

The witnesses Whtye and Johnson do not agree as to the exact location of the Y, Whyte placing it farther south than Johnson's survey.

The above are the only improvements, structures or appliances ever placed on the land by the Railroad Company.

They would all be included, (except said temporary Y) within a strip of land on the west side, seventy-five feet wide on the north and thirty-five feet wide at the south, allowing ten feet from centers of tracks. (R. p. 170.) *The Y was a mere temporary affair, laid on the surface of the ground, without any grading.* In 1892 the remains of the Y and all buildings were removed, and since then there has been nothing on the land except said original main track and parallel siding.

Twelve feet on each side of the center of the track was ample for all business ever done on the land by the railroad. (The above is the substance of the testimony of all the witnesses.) (R. pp. 124-135, 138-147.)

The court peremptorily charged the jury to find that "the railroad built its main track across the land near its western boundary, and also built a side track on it and a Y near the center of it and extending eastwardly across the land to beyond the center of the land, and also a small house used as a ticket office, and a car shed; it used in the operation of the

road up to 1892 the main and side track and houses." (R. p. 18.)

This was excepted to at the time by plaintiffs as a charge on the evidence, as well as upon other grounds. (R. p. 63.)

In response to special issues the jury found:

(a) That no part of said 25 acres was actually used by the Railroad Company in connection with the operation of the railroad, at the date of the International Trust Company mortgage, March 29, 1880. (The Company did not then own the land.) (R. p. 20.)

(b) That the Railroad Company did not, under any of its organizations, ever actually use for railroad purposes, or in connection with the operation of the railroad, any part of that portion of the 25 acres sued for by plaintiffs, (being all except 100 feet on the west side) other than so much as was occupied by said Y. (R. pp. 20, 21.)

(c) That said Y was only of a temporary character. (R. p.)

(d) That there is no evidence that said Y existed either at the date of the International Trust Company foreclosure, January 3, 1883, or at the date of the Central Trust Company mortgage, August 30, 1888. (R. pp. 20, 22, 23.)

(e) That the Railroad Company was not actually using the Y on the 25 acres tract when the Central Trust Company mortgage was executed on August 30, 1888. (R. p. 22.)

(f) That the land formerly occupied as a Y had been permanently abandoned for such use when the Central Trust Company mortgage was foreclosed on February 26, 1895. (R. p. 21.)

These findings have never been set aside, or in any way excepted to by defendants.

(16) *The Condition of the Hughes & Slaughter Tract.*—At a date not shown, the Santa Fe Railroad was constructed across the tract, entering at its southwest corner and emerging 180 feet north of the southeast corner. About 1885, Commerce Street, 80 feet wide, was opened across the north end, and Exposition Avenue along the east side. The Rapid Transit Street Railway tracks were laid along the east side and on Commerce Street. The land has never been fenced.

It has been used "semi-occasionally" for circuses. Except as stated, it has not been used or occupied in any way. (See map, R. p. 124, and Johnson's testimony, R. p. 124 *et seq.;* Gaston's testimony, R. p. 138 *et seq.*)

(17) *The Alleged Necessity and Suitability of the Hughes & Slaughter Tract for Railroad Purposes.*—(*Note.*— We find it practically impossible to present the testimony on this subject in a condensed and at the same time clear and fair manner. Plaintiffs objected to all the testimony on the grounds of immateriality and irrelevancy, as neither of the railroad mortgages purport to cover property because *necessary or suitable* for railroad purposes, but only such property as *was actually acquired or used* for railroad purposes. It seems, however, to have been thought that the bondholders were entitled to take from the general creditors whatever they *needed,* or might in any event need, whether they had any mortgage on it or not, and on this apparent assumption a curious lot of testimony was admitted. We will present and classify it as best we can.)

(18) *Circumstantial Evidence.*—This tract is the only land *now* in the City of Dallas the railroad ever owned. However, it was not in the city limits until 1889 (R. p. 128), nine years after the International Trust Company mortgage was executed, six years after it was foreclosed, four years after the last Company was organized, one year after the Central Trust Company mortgage was executed, and the very year the State brought the suit which finally forfeited its charter. When the land was purchased the road was in the possession of the Gaston "flat iron tract," under contract of purchase, intending to locate its terminals thereon. (R. p. 130.)

The land is not on or near any other railroad except the Santa Fe, and it is a mile from the Santa Fe stations, two miles from the postoffice, 1,300 feet from the T. & P., 3,000 feet from the H. & T. C. (R. p. 128.) The road has never owned the right of way to the land in either direction; for 2,570 feet on the south and 1,307 feet on the north it simply has a license from Gaston. (R. pp. 129, 138.)

No reason is given for not acquiring or attempting to acquire this right of way, except the unsuitability of the location. (R. p. 140 *et seq.*) The land has never been used except in an occasional and subsidiary manner. From choice, and as a matter of business, the road, under all its organizations, has preferred to use and has used the city terminals of other companies. (R. p. 125.) Under the last *regime* a permanent connection was made with the H. & T. C., 1½ miles south of the land, which had been substantially abadoned for every railroad purpose since 1892. (R. p. 125.) The road stops at Cedar, about 50 miles from Dallas. Early in its history it forfeited its charter right to extend beyond this point by failing to prosecute the work as required by statute. Since 1891 it has had no charter whatever.

The road has never had much business. It had one engine and some 14 cars, mostly wood cars. It and everything connected with it was bought by Huntington and Pardee for $250,000. The road itself seems to have been chronically insolvent, but there is no evidence that the stockholders and bondholders, and Huntington and Pardee were insolvent, and no reason is suggested by the evidence why they, or some of them, should not have equipped and used the land for terminals, etc., if they ever intended to do so, or thought they had a right to do so, or that it would be good business policy.

The above are some of the circumstances shown by the record that were presented to the jury.

(19) *Opinion Evidence on Imaginary Case.*—The following is taken from the statements of facts:

Counsel for defendants asked the witness Johnson the following question:

Q. "Assuming that the Texas Trunk Railroad should be extended from Dallas, its present terminal, to the southern terminal, Sabine Pass, with a branch over from some point on its main line to Sabine River, making about 350 miles of railroad in length, and having no other railroad property in Dallas, please state whether this 25 acres tract would be necessary for the railroad for terminals, yards and other rail-

road purposes?" The plaintiffs objected to the question and the answer sought to be elicited from the witness, on the ground that it was immaterial and irrelevant, and on the ground that the description in the International Trust Company's mortgage and in the decree foreclosing the mortgage, could not be aided, enlarged, or explained by testimony as to what the railroad company needed, and on the further ground that what the railroad company needed could not be shown by the opinion of the witness. Each of the objections was overruled by the court, and the witness answered as follows:

A. "Yes; the Company would need that 25 acres or some other 25 acres contiguous. They ought to have 40 acres." To the overruling of the above objections, and the admission of said testimony, plaintiffs then and there excepted. (R. pp. 126, 127.)

Counsel for defendants propounded to the witness the following question:

Q. "Considering the locality and situation of the property, (referring to the Hughes & Slaughter tract) is it favorably situated for the handling of freight in connection with other railroads?" The plaintiffs objected to the question on the grounds of immateriality and irrelevancy, and that the matter could not be shown by the opinion of the witness, and that the description of the International Trust Company mortgage and the decree of foreclosure could not be aided, enlarged or explained by any such testimony, which objections were overruled by the court, and the witness answered as follows:

A. "I consider that a very convenient point; it is reached by several streets, and it is within reach of the connecting lines of railroads—the Sata Fe, the Central, and the T. & P." To the overruling of said objections and the admission of said testimony plaintiffs then and there excepted. (R. p. 127.)

Counsel for the defendants then propounded the following question:

Q. "Take the railroad as it existed in 1888, extending from Dallas to Cedar Station, about 50 miles, and if it was in a condition to be

operated, the average condition of Texas railroads, and was not renting terminals, stations, etc., from other lines, but had its own stations and terminals, and were to have its own stations in Dallas, and had its own shops for attending to its engines, and other properties for the operation of the railroad, state whether this 25 acre tract would be necessary for it, that is, without considering the 12 acres in the Gaston (Mays?) tract?" The plaintiffs objected to the above question and to the testimony sought to be elicited thereby, on the ground that it was immaterial and irrelevant, and on the further ground that the description in the Central Trust Company's mortgage or the decree foreclosing the same, could not be aided, enlarged, or explained by any such testimony, and on the further ground that the facts could not be shown by the opinion of the witness. Each of the objections were overruled by the court, and the witness answered as follows:

A. "Yes, sir; I think they would have needed it. It would have given them conveniences which they would not have had on a narrower or smaller piece of land. There would have been warehouses for different branches of business, and machine shops, and turnouts and water stations, and depots, and other things, and I think the 25 acres would have been required for legitimate railroad purposes." To which ruling of the court, and the admission of said testimony, plaintiffs then and there excepted.

The same question was then asked as to the conditions as they existed in 1895, and the same objections were made by plaintiffs and overruled by the court, and the witness made the same answer. To which ruling of the court plaintiffs then and there excepted. (R. pp. 127, 128.)

Counsel for defendants asked the witness Whyte the following question:

Q. "Assuming that the Texas Trunk Railroad Company takes care of its own engine, has its own roundhouse and engines, and its own yards and facilities, what do you say of the necessity of the 25 acre tract for the use of the Company, instead of using other companies'

yards and facilities?"

Plaintiffs objected to the question on the same grounds that they objected to W. M. Johnson's testimony on the same subject. The objections were overruled, plaintiffs excepted, and over said objections and exceptions, the witness testified as follows:

A. "The ground would be absolutely necessary to have terminals; you could not get along without them; all of it would be necessary as it now stands. If the road was extended over the route called for by its charter from Dallas to Sabine Pass, this 25 acres would not be enough." (R. pp. 194, 195.)

Counsel for defendants asked said witness the following question:

Q. "If the Texas Trunk should be put in the average condition of other Texas roads, state whether or not all of the tract would be necessary for it?"

Plaintiffs objected to the question on the same ground that they objected to a similar question propounded to witness Johnson. The objections were overruled, plaintiffs excepted, and over said objections and exceptions the witnesses testified as follows:

A. "All of the tract would be necessary, and more." (R. p. 142.)

(20) *Direct Evidence on the Real Case.*—After testifying as above, the witness Johnson further testified as follows: "The Railroad Company never used or needed more than 12 feet on each side of their track for loading and unloading and delivering of the freight they actually hauled. My testimony as to what they might need is based upon its being a very different railroad from what it was. They did not have any business in 1888 hardly except the wood business. (R. p. 128.) When the railroad was constructed in 1880, that was not a convenient point for receiving and delivering freight. There was no street open to them. Neither Commerce nor Main Street was open. The streets were extended there nine years afterwards." (R. p. 128.)

Q. "Was there any mud out there in the winter time?"

A. "Oh, law! Hum! Black waxy ground! It was not possible to haul any freight to or from that point in wet weather. We generally

have wet winters. The 25 acres was used as a terminal for wood wagons, and for a while they landed the passengers at that box house, and let them stand out there in the wind and rain until they could take them up. That did not last very long." (R. p. 129.)

The following is from the cross examination of the witness Whyte: "I do not know whether 25 feet on each side of the track would cover all the land actually used since 1892—contingencies might come up. You should have enough room for wagons to come between the cars there, so you would not strike the teams; 25 feet is not far enough. In throwing wood off they throw it far enough, so a wagon could come between. I can throw a stick of wood more than 25 feet—some of it slides off. The men out there are not powerfully strong necessarily." (R. p. 143.)

Here counsel for plaintiffs showed the witness the following instrument, filed in the United States Circuit Court in the case of the Central Trust Company v. the Texas Trunk Railroad Company:

In the Circuit Court of the United States for the Northern District of Texas, at Dallas.

CENTRAL TRUST COMPANY

v.

TEXAS TRUNK RAILROAD COMPANY.

To the Hon. Judge of said Court:

And now in the above entitled and numbered cause comes Charles Dillingham, Receiver of the Texas Trunk Railroad Company, and with respect unto the court represents:

That the said Texas Trunk Railroad Company is practically without terminal facilities at Dallas, the most important point on its line. The only terminal facility the said road now has at said Dallas is a little depot in East Dallas of the following dimensions, to-wit: a frame house fourteen feet long and ten feet wide.

That said depot is one and one-fourth miles from the business portion of said Dallas and is about one mile from the depot of any other railroad running into said Dallas.

That because of the *want of connection* with other roads all freight handled by said road to and from said Dallas has had to be by it and *at its own expense transferred.* That the expense of making such transfers amount to about $195 per month. That *because of the distant and inconvenient location of said depot* the said railway loses a great deal of freight and passenger traffic which it would obtain at much profit if it had proper terminal facilities and a connection with some trunk railway.

That the cost of making the present terminal facilities adequate would be very considerable, and that *even were such expenditure made still the extreme disadvantage of the want of a terminal nearer the business portion of said Dallas and the want of a connection with some line of railway would still exist, and for these reasons your Receiver suggests that a connection with some line of railway which would permit the use of its tracks and terminal facilities would be both advisable and profitable.*

Your Receiver now shows that he can, by constructing about a mile of road, make connection with the Houston and Texas Central Railway, a trunk line. That said mile of railway, including the price to be paid for right of way, can be constructed at a cost of about Twelve Thousand Dollars, and said Twelve Thousand Dollars can be procured by your Receiver by the sale of certificates at par at 7 per cent., such certificates to be a lien only upon the mile of road so constructed.

Your receiver has caused a survey of said mile of railway to be made and here presents accurate maps and plats thereof, and to locate same the field notes following are submitted: (Here follows field notes.)

Your Receiver further represents that *favorable, desirable and advantageous* arrangements can be made with the Houston and Texas Central Company whereby the said Texas Trunk Railway Company will be permitted to use the tracks and terminal facilities of said H. & T. C. Ry. Co., which are conveniently located and entirely adequate, and this at a nominal cost compared with the cost of transfer of freight, to say nothing of the increase to said Texas Trunk Railway Company in

the way of freight and passenger traffic, and protection to its rolling stock and convenience of repairs to such.

Wherefore, premises considered, your petitioner prays that a decree be entered by your Honors authorizing him to construct said mile of railway as shown by the maps and plats thereof and the field notes above given, including the power to purchase right of way, all necessary material and to contract for the necessary labor, etc., and to issue and sell Receiver's Certificates to the amount of Twelve Thousand Dollars and to use the proceeds thereof in the construction of said mile of railway and to contract with the said Houston and Texas Central Railway for the use of its tracks and terminal facilities and to do any and all such acts as may be reasonably necessary to perfect the contemplated connection, and for general relief, etc.

BARRY, ELLISON & ETHERIDGE,
Attorneys for Receiver.

Wm. Whyte being duly sworn deposes and under oath says, that he is the superintendent of the Texas Trunk Railway Company under and by virtue of employment from Chas. Dillingham, Receiver thereof; that he has read and is familiar with the allegations in the foregoing petition, and that the same are true as therein set forth and that as agent for said Chas. Dillingham, who is not now personally present, he subscribed this affidavit. WM. WHYTE.

Sworn to and subscribed before me this 1st day of February, 1892.

(Seal.) BRYAN T. BARRY,
Notary Public, Dallas Co., Texas.

Endorsed:—No. 193 Eq. Central Trust Co. vs. Texas Trunk Ry. Co. Application of Receiver Dillingham for authority to construct additional road to connect with H. & T. C. Ry. Co. Filed February 8, 1892. J. H. Finks, Clerk, by Chas. H. Lednum, Deputy. Barry, Etheridge & Ellison, Attys. for Receiver. (R. pp. 198-201.)

After reading the above instrument the witness proceeded:

"I signed and swore to that paper. I remember the circumstances now. I did not go into details in that paper; I stated all that I thought

was necessary to state, in a general way. All the facts stated in that paper were true I suppose. I expect I had my books and records before me when I made that statement. I did not then think that the 25 acres was a suitable terminal for that road, *that is, for freight and passengers.* Railroads have shops two or three miles from the depots sometimes. The Texas Trunk never had a telegraph line. I meant that the 25 acres was inconvenient for freight and passengers when I made that statement, but it would be a first-rate place for shops. I think that land would be a very good terminal now, *distinct from the freight and passenger business. It would not be advisable to build terminals in East Dallas for freight and passengers even if we had the money; it would be better to come down town.*"

Q. "You applied in 1892 to the Federal court for permission to spend $12,000 to build a new mile of road and get down to the H. & T. C., with no understanding except the understanding from day to day that you would have the right to use the terminal facilities of the H. & T. C.?"

A. "Yes, sir. I will explain that to the jury. I was superintendent for the receiver, Dillingham, and much of this was through his advice; he was talking with the manager of the Central, I expect, and he may have had some understanding better than I had—I do not know about that. I meant to say that I was carrying out Atkins' instructions. I do not know of any change in the rules between Dillingham's and Atkins' administrations. I can not say that I know anything about the rules between the receiver and the managers of the Huntington road. I do not know who the H. & T. C. road belongs to; I have no proof nor no knowledge about it—we hear these things. I understand that Huntington got charge of the Central along after I went with the Texas Trunk." (R. pp. 144-147.)

The court peremptorily charged the jury that "This was the only land the road owned in Dallas where it terminated; both as originally contemplated and as actually constructed; if the road had been properly constructed and operated, it would have needed *as much as 25*

acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of construction and operation." (R. p. 18.)

In response to special issues 11, 12, 13, the jury found as follows: —Considering the reasonable intentions and actual or probable present and future needs of the Railroad Company:

(a) *None* of that portion of the 25 acres sued for by plaintiffs was reasonably necessary for the "construction, equipment or operation" of the railroad, either when the International Trust Company mortgage was executed, March 22, 1880, or when it was foreclosed, January 31, 1883.

(b) *None* of it was reasonably necessary for the construction, repairs, renewals, improvements, completion, operation or management of the railroad when the Central Trust Company mortgage was executed on August 30, 1888. (R. pp. 29, 30.)

These findings have not been set aside or excepted to by defendants.

(21.) *Tax Assessments.*—Defendants introduced the assessments for taxes in evidence to show payment of taxes, whereupon plaintiffs (over defendants' objections) read the whole instruments to the jury, showing that the Railroad Company rendered 22.08 acres of the 25 acres tract as *not* included in the separate assessment of its "right of way, road-bed, superstructure, depots and grounds upon which said depots are situate, and all shops and fixtures of every kind used in operating said road," and as included in "all lands and town lots in the country, exclusive of right of way and depot grounds." This 22.08 acres would include the whole tract less a strip about 80 feet wide. (R. pp. 147, 148.)

The Mays tract was rendered the same way. (R. pp. 147, 148.) The 11.92 acres in the Mays tract does not include right of way, which was deeded separately. (R. pp. 3, 75.)

(22) *The Aspley Deed.*—R. F. Aspley claimed an interest in the John Grigsby survey as one of Grigsby's heirs.

On March 19, 1889, the Texas Trunk Company obtained from

Aspley a quit-claim deed to a strip of land *50 feet on each side of the center of its track*, from the T. & R. railroad, *through the Hughes & Slaughter tract*, south to the survey line. (R. p. 90.) There is no evidence that the Company obtained or attempted to obtain any deed to any land outside this 100 feet.

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JAMES H. McKENNEY,
Clerk.

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Supreme Court of the United States,

OCTOBER TERM, 1902.

EDWARD H. PARDEE AND ARABELLA D. HUNTINGTON, EXECUTRIX, AND CHARLES H. TWEED AND ISAAC E. GATES, EXECUTORS, OF COLLIS P. HUNTINGTON, DECEASED,
Plaintiffs in Error,

vs.

A. D. ALDRIDGE, A. F. HARDIE AND W. G. MOWRY, TRUSTEES FOR J. E. DOWNES AND ASSOCIATES,
Defendants in Error.

SUPPLEMENTAL ARGUMENT FOR DEFENDANTS IN ERROR.

W. J. MORONEY,
Counsel for Defendants in Error.

Supreme Court of the United States,

OCTOBER TERM, 1902.

EDWARD H. PARDEE and ARABELLA D. HUNTINGTON, Executrix, and CHARLES H. TWEED and ISAAC E. GATES, Executors, of Collis P. Huntington, deceased,
Plaintiffs in Error,
vs.
A. D. ALDRIDGE, A. F. HARDIE and W. G. MOWRY, Trustees for J. E. Downes and associates,
Defendants in Error.

No. 137.

SUPPLEMENTAL ARGUMENT FOR DEFENDANTS IN ERROR.

W. J. MORONEY,
Counsel for Defendants in Error.

What we shall now say will be mainly in reply to the brief of plaintiffs in error, which had not been filed when our original brief was prepared. Before discussing the questions of law suggested by brief of plaintiffs in error, it is advisable, first, to correct a number of errors of statement, of more or less

importance, that appear in the brief. When the record is correctly understood, the main contentions of plaintiffs in error become irrelevant or immaterial.

(1.) The brief of plaintiffs in error at least implies that this controversy involves *all* of the Hughes & Slaughter and Mays tracts, including those portions of such tracts that were used for railroad purposes. This is not correct. While in plaintiff's petition (R., 2), all of these tracts were described and claimed, yet on the trial plaintiffs expressly abandoned this claim as to a strip 100 feet wide on the west side of the Hughes & Slaughter tract, and 200 feet wide through the Mays tract (R., p. 150), embracing all the land, with perhaps a trifling exception, that was ever used for railroad purposes; and by the judgment of the Court of Civil Appeals (R., 210, 211), plaintiffs in error recovered this land, and there is no controversy in respect to the same. In the District Court we expressly admitted that this land belonged to defendants, and by the judgment of the Court of which they are complaining plaintiffs in error were awarded the title and possession of the same.

The importance of this matter will now become clearly apparent. In several places in brief of plaintiffs in error, and especially on pages 69 *et seq.*, they undertake to detail the evidence showing to what extent the land was used for railroad purposes. With a trifling exception, which we shall presently notice, absolutely *all* of these railroad uses and improvements were confined within the land as to which plaintiffs below disclaimed, and which plaintiffs in error have recovered. The only exception, if it can be called an exception, is the spur track, shown on map, opposite page 124 of the Record, which is usually designated in the Record as a "Y." There is absolutely no evidence showing or tending to show that this "Y" was constructed until long after the foreclosure of the International

Trust Company mortgage in 1883. There is no evidence that this "Y" was ever used, and the evidence almost certainly indicates that it was never completed. The evidence tends to show that at some period after the foreclosure of the International Trust Company mortgage, the construction of a "Y" was commenced, and then abandoned, because found to be useless and unnecessary. The testimony on this matter is fully presented in appendix to our original brief, pages 55 *et seq.*, to which we respectfully refer the Court. The location of the railroad improvements is shown on maps opposite page 124 of the record. The witness Johnson testified without contradiction as follows: "Leaving out of consideration for the present the round track or Y, the railroad *never* had any improvements east of where they are shown on the map, 75 feet from the west line at the north end and 35 feet from the west line at the south end would include all the railroad improvements that were ever on the land at any time, except the Y, allowing 10 feet east of the centre of the track. I do not know when the Y was built. I found it there in 1891 as shown on the map" (R., 125).

It will of course be observed that plaintiffs in error recovered to a line 100 feet east of the west line of the Hughes & Slaughter tract, and as to this 100 feet there is no controversy. Without now further discussing the testimony, we will say, without fear of successful contradiction, that *there is not a scintilla of evidence anywhere in the record showing or in any way tending to show that prior to the foreclosure of the International Trust Company mortgage in 1883, the Railroad Company actually used any of the land recovered by defendants in error for any purpose whatever.* This is also true of the Mays' tract. The second map, opposite page 124 of the Record, shows a spur track extending 75 feet from the main track, while defendants below, now plaintiffs in error, recovered to a line 100 feet on each side of the main track.

The evidence does not show when this spur track was built, and it is wholly immaterial, because it is located on the land recovered by plaintiffs in error, not claimed by us. The portion of the tract used for sand would also be included within the strip of land 200 feet wide through the Mays tract as to which there is no controversy, and which plaintiffs in error recovered.

(2.) The statement made in brief of plaintiffs in error, pages 2, 3, that the property in controversy was acquired for the "construction and operation of the railroad" and for terminal purposes, is in direct conflict not only with the evidence, but also with the special verdict of the jury, which finds that it was acquired for subdivision into lots and sale (see Special Findings 3*a*, 3*b*, 4, 5, 6, 14, Record, pp. 19-22).

(3.) The statement in brief, page 2, that what we have called the bonus lands had "been given to the company *as originally organized*," is also incorrect. Some of these lands were given to the first company, some to the second and some to the third. This is all correctly stated in our original brief, and the materiality of the matter there pointed out.

(4.) The statement in brief, page 3, that the Mays tract contained a sand bank "and other material adapted to the construction and ballasting of the line," is, so far as the matter in quotation is concerned, entirely without evidence or other matter in the record to support it.

(5.) The statements in brief, page 3, that the Hughes and Slaughter tract was "in the town of East Dallas in 1880," and is "now probably worth at least $50,000," and the further statement (p. 17), that the claims of defendants in error were "generally for small amounts," are all probably immaterial, but they are certainly incorrect, and may

tend to give a false color to the case. The only evidence as to the location of the land when it was bought, with reference to the city limits, was that of the witness Johnson. "When the railroad was built the land was outside the limits of the City of Dallas. In 1889 I think it was taken inside the city limits" (R., p. 128). The only evidence as to the value of the land is that it was assessed at $22,000 (R., 149). The uncontradicted evidence is that the claims represented by defendants in error amount to upwards of $30,000, and if interest for some twenty years be added, they would now amount to over $75,000. (R., 136, 137).

(6.) On page 9, referring to certain execution sales against the *second* company, it is stated that it was the evident purpose to "sell everything to which the Texas Trunk Railroad Company, *as originally organized* or then existing had any claim of title." Of course this is manifestly incorrect. An execution sale against the *second* company could not affect the *first* company, and no such intention is deducible from the record. If such had been the intention it would, of course, have been nugatory.

(7.) On pages 14, 16, it is said that the foreclosure decree directed Atkins, Receiver, to "convey any property standing in his name or to which he had in any manner acquired title." This is incorrect. The only property sold to Pardee was the property described in the Central Trust Company mortgage (R., 98). The only direction to make a deed was to execute "a deed or deeds to said Pardee duly made and executed *of the property sold*" (R. 99). There is absolutely nothing in any order of Court of the character stated in brief of plaintiff in error. This matter is correctly stated in our original brief, page 13, paragraph 14.

(8.) The statement in brief, pages 15 and 16, as to the character of the suit of Atkins *v.* Campbell, the

issues involved, and the nature of the decree, contains much that is imaginative. The facts are coldly stated in the Record, pages 106–114, and are correctly condensed in our original brief, pages 11, 12, paragraph 13. That this decree is wholly immaterial in the present aspect of the case is shown in our original brief, pages 29 *et seq.*

The statement is made in brief, page 37, that "the Circuit Court of the United States had three times adjudged that the two tracts in question had passed out of the Texas Trunk Railroad Company by the foreclosure of the International Trust Company mortgage." This is absolutely incorrect. In neither of the foreclosure suits was any such issue made or involved. No order was ever made appointing a receiver of these tracts. There is no evidence that any receiver was ever in possession of any of the land now in controversy. It is admitted that the issue was made in the suit of Atkins *v.* Campbell, but whether the decree was rendered on that or some other issue does not appear. Even if the issue was there made and decided, the decree would bind only those who were parties and privies, and this effect is conceded to the decree. The decree of a Federal court, when offered in evidence, under a claim of *res adjudicata*, has precisely the same effect as the decree of any other court of competent jurisdiction. The actual owners of the property were not before the Court, and it is surely unnecessary to argue that the decree could not bar their rights. When counsel become frenzied and speak of the Court of Civil Appeals "deliberately, if not maliciously, overthrowing decrees regularly rendered by the Circuit Court of the United States," they are themselves, perhaps, not excessively observing that comity they seem to expect of others. The Court of Civil Appeals correctly decided that every decree of the Federal court was binding on the parties, and their privies, to the extent of the issues made and decided, but that such decrees were not *res adjudicata* as to parties not before the

Court, nor as to issues that were not made or decided. We see in this no occasion for any excitement or alarm.

There are allusions throughout the brief to what is variously styled the "scheme," "venture," &c., of defendants in error, referring to the procedure they adopted to collect their debts. The word "scheme" is used in various senses, sometimes complimentary, sometimes not. It has been used in referring to the Deity, as when the "scheme of creation" is mentioned. We believe the word is never used in an opprobrious sense in referring to the "schemes" of railroad magnates, which are always above suspicion or reproach, and therefore opposing counsel are to be understood as using the word in the euoligistic sense with which they have become familiar through their celestial environment. Any other intention can not be admitted for a moment. The plaintiffs in this suit, whose debts are unquestioned, proceeded to undertake their collection by proceedings prescribed by the laws of the State of Texas. These proceedings have been pronounced proper and efficacious by the Courts of Texas, and in so adjudging no question of Federal law or right was involved. It would seem, therefore, that animadversions on these proceedings at this stage of the case are, to say the least of it, somewhat irrelevant, even though it be the purpose to be complimentary, through the careless use of ambiguous phrases.

We will now discuss some of the questions of law suggested by brief of plaintiffs in error.

Jurisdiction to review questions of fact.

We do not clearly understand what is contended on this question. That the jurisdiction sometimes exists, and at other times does not exist, cannot, we suppose, be seriously questioned. We are only concerned with the question as it arises in cases brought here by writ of error to State courts of last resort.

We think it is settled that in such cases the jurisdiction does not exist. The jurisdiction is subject to even further limitation. It is confined not only to questions of law, but to Federal questions. All questions of local and general law are foreclosed by the judgment of the State Courts. Cases are cited to the effect that this court may "consider the facts." Of course this can be done, in a proper case, and subject to certain well defined limitations. No case can be intelligently considered without considering the facts. It is not supposed that the jurisdiction to review judgments was created or vested for the mere purpose of affording opportunity for academic discussion of abstract legal questions. But where are the facts to be sought—in the breath of counsel, in unsupported assertion, or in the verdict of the jury? This is a case wherein it is sought to review a judgment rendered on a special verdict of a jury, and yet the issues and special findings upon which the judgment was actually pronounced by the Court of Civil Appeals are not so much as mentioned in the able brief of opposing counsel, unless by some fugitive allusions to unnamed matters which are said to have been "manifestly irrelevant," but which were submitted to the jury only because the Court made the "mistake in yielding to the importunities of counsel." No mention is made of the opinion and judgment of the Court of Civil Appeals that these "manifestly irrelevant" matters were the ultimate, controlling issues in the case. We do not question the proposition that when the ultimate facts have been settled by agreement, special verdict, or other proper proceeding, and a question arises whether or not under such facts a party has been denied a Federal right, this Court has the jurisdiction to "consider the facts" as thus established, for the purpose of deciding such Federal question, provided, of course, the question has been raised in a proper time and manner. But no court, in a common law case, has ever been invested with the power to ignore the ver-

dict of a jury on the ultimate issues in a case, and render judgment regardless of the verdict on the Court's view of the evidence. Certainly, no such jurisdiction is vested in this Court. As we have shown in our original brief, special findings on irrelevant matters, or mere matters of evidence or argument, may be ignored as surplusage, as was properly done by the Court of Civil Appeals in this case, but this cannot be done in respect to findings on ultimate issues. What were the ultimate issues, and how is the question to be answered? Manifestly from an examination of the language of description used in the mortgage. This clearly shows that the mortgage included lands "used" for railroad purposes, and lands "intended" for railroad purposes, and nothing else. Waiving all questions that might manifestly be made as to the legal sufficiency of these terms of description, when the jury found that none of the lands in controversy were either used or intended for railroad purposes, but that they were all in fact acquired for subdivision into lots and sale to employees of the company, there is really no room for argument on the proposition that the ultimate issues in the case were decided against the plaintiffs in error.

We will here stop to comment on a strange misconception in brief of plaintiff in error, where counsel claim that they understand that the effect of the decision of the Court of Civil Appeals is that the railroad company was "without power" to mortgage the property (see p. 95 *et seq.*). There is nothing of the kind, in the opinion of the Court of Civil Appeals, and no such contention has been made by us. No question arose as to what the railroad company *could* mortgage. The only question was what property did it *in fact* mortgage? The only question of law that could arise in this connection was what is meant by a "railroad purpose"? Without discussing the point, the Court of Civil Appeals held that "the jury were authorized to find that Company No. 1 had put to use all that portion it intended

for railroad purposes, and intended to sell the balance to its employees to build upon, *which latter cannot be held to be for railroad purposes.*" The question of what is a "railroad purpose," as applied to a railroad corporation organized under the statutes of the State of Texas, is obviously a question of local law, not here subject to review. But it may not be improper to show, by citation to the Texas statutes, that this ruling was clearly correct. The Texas Revised Statutes of 1879, under the title "Railroads," provided as follows:

"ART. 4212.—Such corporation shall have the right to take, hold and use such voluntary grants of real estate and other property as shall be made to it in aid of the construction and use of its railway, and to convey the same when no longer required for the use of such railway, in any manner not incompatible with the terms of the original grant.

"ART. 4616.—Such corporation shall have the right to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery for the accommodation and use of passengers, freights and business interests, or which may be necessary for the construction or operation of its railway, but no railway company shall have the power, either by its own employees or other persons, to construct any buildings along the line of their railroad to be occupied by their employees or others, except at their respective depot stations and section houses, and at such places only such buildings as may be necessary for the transaction of their legitimate business operations, and for shelter for their employees; nor shall they use, occupy or cultivate any part of the right of way over which their respective roads may pass, with the exception aforesaid, for any other purpose than the construction and keeping in repair their respective railways.

Under these statutes it is obvious that the ruling of the Court of Civil Appeals was correct.

Assignments of Error of Plaintiffs in Error.

We wish to call attention to the fact that the assignments of error of plaintiffs in error, as presented in their brief, pages 27, 28, are very different from the assignments of error found in the record, pages 231 and 233. We have heretofore briefed this case on the assignments found in the record, and, unless we are mistaken as to the practice of this Court, no other or different assignments will be considered. If the Court shall consider the alleged assignments as contained in the brief, we deem it [illegible] to say that the Court of Civil Appeals made none of the rulings that are charged to have been erroneous. The Court of Civil Appeals did not assume to exercise original jurisdiction and decide the questions of fact which had been settled by the special verdict. The Court of Civil Appeals merely decided that on the ultimate facts, as established by the special verdict and agreement of the parties, the trial Court had entered an erroneous judgment, and thereupon proceeded to correct the error.

The only specific assignments of error contained in the record are based upon the refusal of the Court of Civil Appeals to hold that certain special charges were improperly refused. There is no reference whatever to these matters in the alleged assignments contained in brief of plaintiffs in error.

The "Third Point" of Plaintiffs in Error.

This point is expressed in the following proposition on page 105 of brief of plaintiffs in error:

"The property being in the custody of the Federal court, through its receiver appointed in the proceedings therein pending for the foreclosure of the mortgage of the Central Trust Company, sales thereof under process of other courts and by other parties, in disregard of the possession of the Federal court, were void."

We will first call attention to some features of the record that have not heretofore been presented. The final decree foreclosing the Central Trust Company's mortgage was passed on February 26, 1895 (R., 98). Sale thereunder to Pardee was made on August 27, 1895 (R., 98), and confirmed on March 3, 1896 (R., 99), and sale completed by delivery of deed on April 9, 1896 (R., 100). The Court ordered that upon the purchaser complying with his bid and receiving a deed, "the railroad and property so sold shall be, upon demand of said purchaser, or his assigns, delivered to said purchaser by the receiver herein" (R., 99). It thus appears that as early as April, 1896, the foreclosure proceedings were completed, all functions of the Receiver terminated, and that the Receiver thereafter held the property, not subject to the order of the Court, but subject alone to the order of the purchaser, who, for purposes of his own, and from choice alone, appears to have left the property in the hands of the Receiver. The title of defendants in error accrued long after these proceedings occurred. The deeds from the trustees of the first company to Bumpas, trustee, were executed on December 28, 1897 (R., 120), and, of course, all the other proceedings occurred subsequent to that date. Under these circumstances it is settled by the authorities that at the time the title of defendants in error accrued the Federal ostensible receivership had in legal effect ended. When property in the hands of a receiver is sold under order of Court, sale confirmed and complied with, deed made to the purchaser, and Receiver directed to deliver the property to the purchaser on demand, and the purchaser, after a reasonable time, fails to demand possession, but voluntarily leaves the property in the Receiver's hands, such property ceases to be in *custodia legis*, and the Receiver in fact becomes the private agent of the purchaser (H. & T. C. Ry. Co. *v.* Bath, 44 S. W., 595; Animarium Co. *v.* Bright, 82 Fed. Rep., 196; Binghman *v.* Superior Court, 72

Cal., 575; H. & T. C. Ry. Co. *v.* State, 89 Tex., 294, and authorities cited, p. 296; The Holladay Case, 29 Fed. Rep., 226). These cases are directly in point, and we believe that no authority to the contrary can be found.

In the second place, the receivership never extended to anything but the mortgaged property, and the property in controversy was not embraced in the mortgage. There is no evidence that the Receiver was ever in actual possession of the property, and if there had been such evidence it would not place in *custodia legis* property not included in the order appointing a receiver.

In the third place, an order appointing a receiver could not affect the power of the real owners of the property, the trustees of the first company, to convey the property, they not being parties to the receivership suit, or subject to the jurisdiction of the Court.

In the fourth place, the power of these trustees to convey was strictly a question of local law, not subject to review in this Court.

In the fifth place, it is plain that no assignment of error in the record raises the question of the authority of the trustees to convey the property, and the question therefore does not arise, even if the Court would have the jurisdiction to consider the question if properly presented. We believe that all these propositions are sound, but we will not be able to discuss them further. It is to be observed that the question of the validity of the execution sale to Bumpas, trustee, under the Thompson judgment, is wholly immaterial, and was not discussed or decided by the Court of Civil Appeals, because plaintiffs below had acquired good title independent of this execution sale. The elaborate argument of plaintiffs in error on this question will therefore not be further noticed.

What is included in a railroad mortgage?

There is a fair abundance of authorities on what is or is not included in railroad mortgages. In the great majority of the cases the property in controversy has been held not to be included. The reason is that the law requires a reasonably certain description, and most of the controversies arise over the absence of such description. So far as we have found, the question has heretofore arisen three times in Texas. In each of these cases the property in controversy was held not to be included in the mortgage. R. R. Co. v. Whitaker & Bonner, 68 Tex. 630; Shirley v. Waco Tap Ry. Co., 78 Tex. 131; McIlhenney v. Binz, 80 Tex. 1. In the United States Supreme Court the question has arisen in the following cases: Smith v. McCullough, 104 U. S. 25; Alabama v. Montague, 117 U. S. 602; Central Trust Co. v. Kneeland, 138 U. S. 414; R. R. Co. v. United States, 112 U. S. 733; R. R. Co. v. Parker, 143 U. S. 42; Humphries v. McKissock, 140 U. S. 304. In all these cases, except Central Trust Co. v. Kneeland, the property in controversy was held not to be included in the mortgage. This is about the proportion found in the supreme court reports of other states. Inferior federal courts have been perhaps more indulgent to railroad mortgages. In Humphries v. McKissock, 140 U. S. 304, the court says that "under the term appurtenances, as used in the mortgage in question, only such property passes as is *indispensable* to the use and enjoyment of the franchises of the company. It does not include property acquired simply because it may prove useful to the company and facilitate the discharge of its business. A distinction is made in such cases between what is *indispensable* to the operation of a railroad, and what would be only convenient," and the court cites with approval State v. Commissioners of Mansfield, 22 N. J. L. 510, which expressly draws the line "where the necessity ends and mere convenience begins." This was the rule applied on

issues made by the pleadings on foreclosure proceedings, and not in construing a foreclosure decree. The same rule is declared in Shirley v. Waco Tap Ry. Co., 78 Tex. 136, as follows:—"The authorities are abundant to the effect that whether subsequently acquired property is included in a conveyance (mortgage) executed by a railway company depends upon its being *necessary* to the enjoyment of the franchise or to the operation of the road, in the absence of special description of it in the conveyance." So a conveyance of "all its property real and personal, acquired or to be acquired, owned or to be owned, used or appropriated for operating or maintaining the road" does not include lands acquired by the company and not thus used or employed. A conveyance of "its corporate privileges and appurtenances" was held not to embrace town lots adjoining the road bed, unless as a matter of fact they were essential to the enjoyment of the corporate franchises.

"The purchaser at a foreclosure sale acquires title to the road as *constructed*. 2 Perry on Trusts, sec. 759; Walsh v. Boston, 24 Ohio St. 28; Railway v. Seymour, 25 Barb. 284; Railway v. Elwell, 67 Barb. 83; Railway v. Livermore, 47 Pa. St. 465."

It will be observed in this connection (1) that both the Hughes and Slaughter and Mays tracts were acquired subsequent to the execution of the International Trust Company mortgage; (2) that there was no special description of either tract in the mortgage or foreclosure decree; (3) that none of the land claimed by plaintiffs was ever used by the railroad company, for any purpose, except so much of the Hughes and Slaughter tract as was at one time occupied by a Y; (4) that there is no testimony in the record definitely locating the land so once used as a Y, and the burden of proof on this issue was on defendants; (5) that the jury has found that such use for a Y was of a temporary and not a permanent character, which finding would exclude it from the mortgage, even if the land had been definitely lo-

cated; (2 Elliott on Railroads, 654, § 498); (6) that the jury has found that the Y was not actually used at the date of either mortgage, or at the date of its foreclosure, and that it had been permanently abandoned at the date of the foreclosure of the Central Trust Company mortgage; (7) that the jury has found that all of said tracts claimed by plaintiffs was acquired by the railroad company for the purpose of subdividing the same into lots and selling the same to employees of the company; (8) that the jury has found that said land was not bought by the company for the use, either immediate or prospective, in the "construction, repair or improvement" of its railroad and that neither in 1880 (when the International Trust Company mortgage was executed) nor in 1888 (when the Central Trust Company mortgage was executed) was it reasonably necessary for the present or the prospective use of the railroad company, in the "construction, repair or improvement" of its railroad, then built or authorized by its charter to be built and operated; (9) that the jury has found that considering the reasonable intentions and actual or probable present and future needs of the railroad company, no part of the land claimed by plaintiffs was reasonably necessary for the "construction, equipment or operation," or for the "construction, repairs, renewals, improvement, completion, operation or management of the railroad."

In this state of the record, what possible ground is there for contending that the land is embraced in the mortgages, unless the evidence offered by plaintiffs, the language of the mortgages, and the findings of the jury be all absolutely ignored, as was in substance done by the trial court.

It is true that under the peremptory instruction of the court the jury found *if* the railroad was properly built and operated it would need "as much as 25 acres," and would need "sand," but there is no such finding that applies to the land in controversy; and the jury expressly finds that the land in con-

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troversy was not needed. All these findings are in fact irrelevant, because neither of the mortgages contained any such term of description as land "needed" for any purpose. A head of a family may be in most urgent "need" of a homestead, yet unless his land is actually used for homestead purposes, or at least actually intended for such purposes, it is not his homestead in law or in fact. If there were any substantial doubt as to the purpose for which the land was acquired or used, or whether a railroad use was temporary or permanent, and if the issue were made at the proper time and under proper pleadings, perhaps it might be legitimate to look to the actual or probable necessities of the company, as mere matter of evidence, to aid in solving the doubt. Under the language of the mortgages the necessities of the railroad can certainly not be inquired into for any other purpose. When the jury has solved the doubt, and returned their verdict, all such mere matters of evidence become irrelevant in entering judgment; even if they can be looked to at all after a decree in foreclosure has passed, containing no certain description.

In the trial court's opinion, an unprecedented use is made of the principle that "all the words of a written instrument should be given some effect when the evidence will warrant this." It is argued that because the mortgages specifically described right-of-way, tracks, depots, station houses, etc., something else must be intended by "appurtenances," etc., and therefore the land in controversy or nothing must have been intended. This is "construction" run wild. It is indeed *constructing* a mortgage outright, and not *construing* it. It would not require much of a stretch of this line of reasoning to authorize a court to levy an assessment on the general creditors to buy whatever "appurtenances" the company might "need" and did not happen to have. The absurdity of the position that the land in controversy was intended to be embraced in the "general words" is shown by the fact that the

company did not own the land when these "general words" were put in the mortgage. To what would the court apply these general words if the land had never been bought? Presumably to the bonus lands, in order to "give them effect." And if there were no bonus or other lands, we dare not guess what would happen.

The trial court is in error in saying that "the practical effect of plaintiffs' contention is to confine the operation of this mortgage simply to the land actually occupied by the tracks of the railroad." If such were the result of the verdict of the jury, we would feel justified in saying, let such be the judgment of the court. But such is not our contention, or the practical effect of our contention. A railroad track, we understand, is eight feet wide, counting to the ends of the ties. The jury gives the mortgage 100 feet through the Hughes and Slaughter tract, and 200 feet through the Mays tract, enough land for more tracks and sidings than any railroad in Dallas actually has, and, according to the evidence, probably ten times as much as the Texas Trunk ever *actually* "needed." The jury understood the issue better than the trial court. They were liberal to defendants. Whether liberal or not their verdict must be the basis of the judgment, if a verdict means anything.

We have mentioned some of the principal cases on railroad mortgages, but we do not stop now to discuss them in detail, because in the present state of the record, they are in fact irrelevant. All, or nearly all, came before the court as mixed questions of law and fact. The court was dealing with the *evidence*, not with the *verdict*. Most of them arose on proceedings to foreclose, and on issues made by bill and answer. It is manifest that we have here no such case. We have now nothing to do with the intention of the railroad company, its actual or probable necessities, or the uses to which the land was put. That has all been settled by the verdict. We merely ask for judgment on this verdict.

The case on its merits.

Opposing counsel have presented this case from entirely different points of view. Opposing counsel in effect ask this Court to exercise original jurisdiction and pass on the facts, ignoring the verdict of the jury. We ask the Court to observe the rules govering a court of error and the limitations on the jurisdiction of this Court established by act of Congress. But we will close this argument by meeting opposing counsel on their own ground. Counsel undertakes at great length to point out what a prospective bidder at the foreclosure sales would have discovered.

The court will doubtless note that opposing counsel think that a prospective and inquisitive bidder would upon enquiry, have ascertained a good many things that were not so, among them, that the property now claimed by plaintiffs was acquired or used for railroad purposes, or that it was suitable for a terminal. But the prospective bidder would also have learned a number of things not mentioned by counsel. In ascertaining that the "flat iron" tract, originally and exclusively intended for the terminal, had not been paid for, he would also have learned that the Company had not acquired, as it has never acquired, the title to 2570 feet of right of way south of the Hughes & Slaughter tract, and without which said tract could not be reached at all.

He would also have ascertained that the Company was still in possession of the "flat-iron" tract, as they are still in possession of part of it, though without title; and he would doubtless have concluded that there was then quite as much probability of acquiring the "flat iron" tract, owned by Gaston, for a terminal, as there was of acquiring the 2570 feet right-of-way, also owned by Gaston, and without which the Hughes & Slaughter tract could not be reached. This probability would have been strengthened by the fact that both the "flat-iron" tract and the 2570 feet of right-of-way were owned

by the same man, were still in the possession of the Company, had been contracted to the Company at one time, and in one transaction, and for a single consideration, and therefore the Company would probably have to take all or none, and if they acquired none they could not, and therefore would not intend to use any part of the Hughes & Slaughter tract for any railroad purpose. He would also have learned, if he had asked Gen. Cabell, the general manager and acting president of the Company, that the land now claimed by plaintiffs was acquired for subdivision and sale into town lots, and he would have seen that the land was eminently suited to this purpose. If, as astutely suggested by counsel, he had supposed that on account of the failure to pay for the Gaston "flat-iron" tract the Company had changed its mind, and had concluded to use the Hughes & Slaughter tract for a terminal, thus for the first time bringing it under the mortgage, by a mysterious sort of mental transmutation, he would have been bluntly told by Gen Cabell, as he testified in this case: "*We did not consider at all the contingencies that would arise from non-payment. We considered the Gaston land very important, for the reason that it was closely connected with the Texas and Pacific, and it was in a fine location.*" He would have seen that none of the land now claimed by plaintiffs was actually used for railroad purposes, and that the improvements on that portion of the land *not* claimed by plaintiffs were of the most trifling character imaginable. He would have at once seen that on account of its distance from the city and from other roads, if for no other reason, the land was, as it is still admitted to be by defendants' "star" witness, Whyte, utterly unsuitable for a terminal; that on this account the Company was then using, as its successors have ever since used, the Dallas terminals of other roads; and, as a sensible man, he would doubtless have concluded, as all of the owners of the road have evidently since concluded, that a little railroad from Dallas to Kauf-

man, with no apparent purpose at that time of ever going much or any further, could better serve itself and the public by dispensing with the luxury and style of an extensive and expensive independent terminal, some two or three miles through black waxy mud from town, and using, as it has ever since used, and will doubtless continue to use, the Dallas terminals of other railroads. If at first he was struck with the Company's "high-sounding" name and the millions of dollars mentioned in its charter, and especially in its mortgage, he would afterwards have learned that the total capital of the concern had never in fact been more than $21,000, and that it was hopelessly swamped. If nevertheless he had found the owners of the road, like the exhuberant Mark Topley, still hopeful and "jolly," he would merely have thought of the remark of Bill Nye's western boomer: "This is the greatest country on earth. When I came here three years' ago I wasn't worth a cent—and now, I owe two millions." If, finally, he had consulted the records, every doubt would have been removed, for there he would have found (and it is all he would have found in any record), that the Company rendered 22.08 acres of the Hughes & Slaughter 25 acres tract, or more than plaintiffs now claim, as "land and town lots in the county, *exclusive of right-of-way and depot grounds,*" and that less than three acres of the tract was included under "right-of-way, road-bed, superstructures, depots and grounds upon which said depots are situate, and all shops and fixtures of every kind used in operating the road." In other words, he would have found that *the only thing of record indicating the purpose of the Company in buying the property, was a solemn and official declaration under oath, to the tax assessor, that all of the lands now claimed by plaintiffs, as well as more land not claimed by plaintiffs, were not used or acquired by the railroad Company for railroad purposes.* This information he would be reasonably certain to get, as every prudent purchaser examines the tax rolls.

A prospective bidder under the Central Trust Company foreclosure, pursuing the course recommended by opposing counsel, would also have found that without apparent objection from the railroad, streets had been opened across the land, and that two lines of double track street cars ran along and across it, all of which would conflict with the idea of the exclusive reservation of the property as a railroad terminal. He would have found that only a short time after the Central Trust Company mortgage was executed, the Company had procured a quit claim deed from Aspley to quiet title to 50 feet on each side of the center of its track through the Hughes & Slaughter tract, but had obtained no deed to that part of the land now claimed by plaintiffs, either because the Company did not claim to own it, as in fact it did not, or because the Company did not intend to hold and use it if it did own it. He would have found that the land had never been used except for streets, street cars, and "semi-occasionally for circuses." He would have found, indeed, that the land had never been sub-divided and sold into town lots, but unlike opposing counsel, he would have readily accounted for this phenomenon, upon which defendants lay such stress, by the fact that the owners of the land, the trustees of the first sold out Company, had no authority to so dispose of the land, and that, in the involved condition of its title, they doubtless could not sell it, without extraordinary sacrifice, to anybody for any purpose. He would have had much more difficulty in accounting for what he saw, on the theory that the property was really owned by the third Company, and was in good faith held for terminal purposes. He would have learned that every vestige of an improvement for terminal purposes had been erased; that starting a couple of miles below town, the road had, at great expense, built a new line to the H. & T. C. terminals; leaving both the Hughes & Slaughter tract and the Mays tract completely off the line of road. He would have

had some difficulty in accounting for the failure to erect terminals on the Hughes & Slaughter tract on account of lack of funds, because funds were readily forthcoming to the extent of at least $12,000 to connect with the H. & T. C. terminal. Besides, the Company had sold Huntington bonds to the amount of $1,000,000, for which Huntington had undoubtedly paid the Company par, because Huntington was a law-abiding man, and cheerfully obeyed the Constitution and Statutes of Texas in such case made and provided. Moreover, the Federal Court had but recently given him judgment for the principal and interest on these very bonds, amounting to $1,308,-814.33, and who could thereafter doubt that the money had passed and that the debt was just? If he had been told that the Trunk had no definite or continuing arrangements with the Central, he would have thought, how extraordinary, to spend $12,000 to connect with the Central, under such circumstances; and he would probably have guessed, as everybody believes, that the Trunk and the Central is one and the same thing; that there was no definite contract between them, because Huntington did not need to contract with himself; and that whatever becomes of this suit, there is no more likelihood of Huntington using the Hughes & Slaughter tract as a terminal, than there is of his establishing a terminal for the Trunk in Egypt.

If he had looked to the charter of the Company, as opposing counsel say he should, in order to discover the probable intentions of the Company, he would have found that when the Central Trust Company mortgage was executed the Company had only a 50 miles charter, with no lawful power to renew or extend; and that at the time of the foreclosure it had no charter at all. If finally he had sought light from the experience of those who had gone before, he would have found that the purchasers under the International Trust Co. mortgage and their successors, had claimed, as included in the mortgage, all the Kaufman and Houston county

lands (though it is admitted now that they were mistaken) and that this claim was quite as strong as their claim to the Hughes & Slaughter and Mays tracts; and this would likely have shaken his confidence in a title resting merely on the disposition to "claim everything."

We respectfully submit that our supposed curious enquirer, if he had average experience and common sense, and was not carried away by "castles in the air" and "expert opinions," would in all probability have reached the same conclusion that the jury reached in this case. At least one who, under these circumstances, would undertake to "surmise or guess as to what the officer intended to sell" and would guess that the lands now in controversy were included, would not, in the language of opposing counsel, be a "person with sense enough to be entrusted with money for any purpose." He would not have the "means of complete information" which law and common sense require. (See appendix to our original brief for complete statement of the facts.)

As a matter of common sense, could anything be more preposterous than to expect prospective bidders at a judicial sale to make any such enquiry as opposing counsel recommend? And in view of the facts, is there any foundation whatever for the claim that the land was acquired for railroad purposes? We think that the undisputed evidence shows quite the contrary; but it is unnecessary for us to make this contention, because the jury has found in our favor, and their findings are amply supported by the evidence, and whether snpported by the evidence or not, as no motion has been made to set them aside, and there is no assignment of error questioning their correctness, they cannot now be reviewed, even if the court had the jurisdiction to review questions of fact.

Respectfully submitted,

W. J. MORONEY,
Counsel for Defendants in Error.

Supreme Court of the United States.

No. 137.—October Term, 1902.

Edward H. Pardee and Arabella D. Huntington, Executrix, and Charles H. Tweed and Isaac E. Gates, Executors of Collis P. Huntington, Deceased, et al., Plaintiffs in Error,
vs.
A. D. Aldridge, A. F. Hardie and W. G. Mowry, Trustees for J. E. Downs and Associates.

In error to the Court of Civil Appeals for the Fifth Supreme Judicial District of the State of Texas.

[March 16, 1903.]

Mr. Justice Holmes delivered the opinion of the Court.

This is an action of trespass to try title to land brought by Aldridge and others, trustees, against Pardee and others, the plaintiffs in error. The only parcels here in controversy are two tracts, known as the Hughes and Slaughter tract and the Mays tract. Both parties claim title under the Texas Trunk Railroad Company. Pardee claims under the foreclosure of a mortgage made by the railroad company and some incidental proceedings. Aldridge claims under a sale outside of the mortgage. The question in the case is whether the mortgage embraced these tracts.

Although it may not be necessary, we will state the title on each side a little more in detail before discussing the questions of law. On March 22, 1880, the Texas Trunk Railroad Company mortgaged its road, "including all appurtenances and appendages of said railroad, and the property of said company now acquired or which may be acquired, in the State of Texas, used for and pertaining to the operation of said railroad." This was to secure bonds. Later in the same year, although the deed was dated earlier, the Hughes and Slaughter tract was conveyed to the railroad. The Mays tract was conveyed the next year. On January 31, 1883, there was a decree of foreclosure on the mortgage in the United States Circuit Court, and there was a sale on the first of the following May. The purchasers organized a new company, under the old charter, but a distinct organization, as permitted by the local law. In 1885 the property of the second company was sold by the sheriff, on execution following a judgment in the State court, and also by the United States marshal, under an order of sale for failure to pay certain sums as provided in the original foreclosure proceedings. The same persons purchased at both sales and organized a third

company, still under the old charter. On August 30, 1888, the third company made a mortgage of the railroad. A bill to foreclose this was filed in the United States court on September 4, 1891, a decree of foreclosure was made in 1895, and Pardee, the plaintiff in error, purchased at the sale, for the benefit of himself and C. P. Huntington. Thus it will be seen that the title of the plaintiffs in error depends, as we said, on the question whether the original mortgage embraced the land in suit.

Before the first foreclosure, but after the execution of the mortgage, suits were begun against the first corporation, and in 1887 a judgment was rendered against it in one of them. On this judgment executions were issued and the parcels of land in suit were sold to the trustee for Downs and his associates, the defendants in error. The trustee brought a suit to try title against the trustees and surviving directors of the first company and a receiver of the third company, and got judgment on April 7, 1898. The defendant directors and trustees also executed a deed to him, and he afterwards conveyed to the present trustees for Downs. If the first mortgage embraced the land, Downs got no rights, but except for that question and one other to be mentioned, his title is not in controversy here, and we do not go into it in detail. The trial court gave judgment for Pardee and Huntington as to the tracts in question, but the judgment was reversed by the Court of Civil Appeals, and final judgment was entered in that court in favor of the trustees for Downs. A writ of error was refused by the Supreme Court of the State. The case is brought here by writ of error on the ground that due effect was denied to decrees of the United States court. *Dupasseur* v. *Rochereau*, 21 Wall. 130. See *Sweringen* v. *St. Louis*, 185 U.S. 38, 41. As we are of opinion that the judgment of the Court of Appeals was right, it is less important than otherwise it would be to discuss the grounds upon which we think that there is jurisdiction, and we shall proceed at once to the merits of the case.

If the disputed parcels of land came under the mortgage when they were acquired, they did so as "property used for and pertaining to the operation of said railroad." At the trial evidence was taken on the question whether these parcels were used for or did pertain to such operation. The defendants in error disclaimed to the extent of a right of way one hundred feet wide, fifty feet on each side of the centre line of the railroad. But there was testimony that the company, when it purchased, intended, after using what was necessary for tracks on the west side, to lay out the rest of the Hughes and Slaughter land in lots and sell them to the employees of the road. So as to the Mays tract; what was needed was taken for tracks and to get sand, and the rest was to be cut up into lots. Both parcels were returned each year for taxation as "lands and town lots . . . exclusive of right of way and depot grounds," in the inventory of the company. The judge instructed the jury to return find-

ings on two special issues to the following effect: As to the Hughes and Slaughter land, the intention of the company was to put there the main track, part of the sheds, and whatever switches and side tracks should be necessary to the operation of the road, and if they did not occupy all of the land to sell lots on the eastern side to its employees. The land was not cut up and no lots were sold. The company built its main track on the west side, a Y extending eastwardly across the land to beyond its centre, and a small house, used as a ticket office and car shed. This was the only land the road owned in Dallas when it terminated, and if it had been constructed and operated properly it would have needed as much as twenty-five acres (the size of the tract) for terminal purposes. As to the Mays tract, the intention was as above stated. The main track was built across it on the east, and a spur track was built to reach the sand. It would be necessary to use sand properly to construct and operate the road.

The foregoing findings were merely the result of rulings on the evidence. But the jury found, on other special issues submitted to them, that all but one hundred feet off the west boundary of the Hughes and Slaughter tract was acquired for the above stated purpose of subdivision and sale, that any use of the rest of the land in connection with the operation of the railroad, except the hundred feet, was only of a temporary character, and that there was no such use of the rest of the land except of so much as was occupied by the Y. There was evidence that the company expected to use another tract for terminal purposes, although it never got the deed. The jury further found that no part of the Hughes and Slaughter tract above what was disclaimed was necessary for the construction, equipment or operation of the railroad when the first mortgage was foreclosed. Also, they found that all of the Mays tract was acquired for the purpose of subdivision and sale. As there was evidence warranting these findings, and as the findings dealt with pure matters of fact, which it was the province of the jury to determine, so far as there was a conflict between them and those which were made under instructions, those which expressed the free judgment of the jury would prevail. We have no concern with the arguments which are urged here in favor of different conclusions. It is enough that there was some evidence to support the free findings of the jury, and that being so, those findings establish the facts, as was held by the Court of Appeals.

On the findings which we have recited the land in dispute was not property used for and pertaining to the operation of said railroad, and the ruling of the Court of Appeals was right. Some point is made of the disclaimer, which is said to have been arbitrary in amount and not based on evidence. But a party may disclaim what he likes, in advance of the evidence, and is not bound to give reasons for his course.

One matter remains to be mentioned. A receiver appointed in the second foreclosure suit brought a bill in equity in the United States court against certain persons who had purchased the land in question on other execution sales. One ground of the bill was that the property was subject to the mortgage, and on July 16, 1895, it was so decreed. It is argued that although the trustees for Downs were not parties to this bill, they in some way were affected by the decree, that the proceeding was *in rem*, and that the decree brought the property into the custody of the court so as to invalidate the sale. *Wiswall* v. *Sampson*, 14 How. 52. But a suit in equity is not a proceeding *in rem*. It does not purport to summon or invite, by notice or otherwise, all the world to come in, so far as there are any adverse interests. It is more personal even than the common law, and works out its decrees by orders to the defendants. Of course, the adjudication in such a suit does not conclude strangers. As to the decree bringing the property into the custody of the court in such sense as to invalidate the sales under which Downs claims, the receiver being a receiver of the mortgaged property only, and there being no representative of the equity of redemption or of Downs's interest before the court, it is not to be presumed that any act was done inconsistent with outstanding rights as now established, or that the receiver was put in possession of property which was not embraced in the mortgage. The receiver was in possession of the road, and his right to the portion of the land over which the railroad ran is not disputed, but it does not appear that he held the residue under an adverse claim, or at all. Although declaring his right to the residue to be paramount to a third person, the court left all others free to assert their claims. There is nothing to show that the mode in which the trustees for Downs asserted their rights was unlawful or void. Probably nothing was done under the suit in equity beyond the entering of the decree on July 16, 1895. The principal sale took place before that date.

Judgment affirmed.

Mr. Justice WHITE and Mr. Justice PECKHAM dissented.

True copy.

Test:

Clerk Supreme Court, U. S.